Supreme Court, U.S.
FILED

961637 APR 14 1997

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No. _____

In The

Supreme Court of the United States

October Term, 1996

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE, JOHN DeBOSE, and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

PETITION FOR WRIT OF CERTIORARI AND APPENDIX, VOLUME I, APP. 1 TO APP. 191

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234 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioner make a sufficient showing of religiously motivated conduct to require that the causes of action for "breach of fiduciary duty" and "outrageous conduct," as applied to impose liability on him, be analyzed under the Free Exercise Clause in the First Amendment to the United States Constitution, as interpreted by the United States Supreme Court and as affected by the Religious Freedom Restoration Act?

2. Are the causes of action for "breach of fiduciary duty" and "outrageous conduct," as applied to impose liability on the petitioner, "neutral principles," such that it is unnecessary to analyze them under the Establishment Clause in the First Amendment to the United States Constitution?

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GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

The judgment sought to be reviewed is the judgment of the Colorado Supreme Court overturning the judgment entered by the Colorado Court of Appeals concerning the Free Exercise Clause, and the judgment of the Colorado Court of Appeals concerning the Establishment Clause, as to which the Colorado Supreme Court did not grant certiorari.

The decision of the Colorado Supreme Court was issued December 23, 1996. The petitioner requested rehearing from the Colorado Supreme Court in a Petition for Rehearing filed January 6, 1997. That Petition for Rehearing was denied by Order of Court dated January 13, 1997.

The decision of the Colorado Court of Appeals was issued November 17, 1994. The petitioner requested rehearing from the Colorado Court of Appeals in a Petition for Rehearing filed December 1, 1994. That Petition for Rehearing was denied by Order of Court dated January 5, 1995. The petitioner applied for certiorari review by the Colorado Supreme Court on the Establishment Clause issue, but that court did not grant certiorari on that issue. Therefore, the decision of the Colorado Court of Appeals is the last decision of a Colorado state court to address that issue. However, the decision of the Colorado Court of Appeals was not ripe for appeal until the Colorado Supreme Court had resolved the other issues as to which it did grant certiorari.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a), on the basis that there is a final judgment by the highest court of the state of Colorado in which a judgment could be had, and that the petitioner claims rights, privileges, or immunities

under the Constitution (specifically the Religion Clauses of the First Amendment) and a statute of the United States (specifically the Religious Freedom Restoration Act).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The constitutional provisions and statutes involved in the case are the Free Exercise and Establishment Clauses in the First Amendment to the United States Constitution, as applied to the states under the Fourteenth Amendment, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb. The pertinent texts of referenced constitutional provisions and statute are set forth in Appendices AA and BB, as set forth in Rules 14.1(f) and 14.1(i)(v) in the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

This is an application for certiorari review of the decision of the Colorado Supreme Court in *Bear Valley Church of Christ, Petitioner, v. Denise DeBose and J.D.B., Respondents/Cross-Petitioners, and Homer Wolfe, Respondent/Cross-Petitioner,* Colorado Supreme Court Case No. 95-SC-42, concerning the Free Exercise Clause (Appendix A); and for review of the decision of the Colorado Court of Appeals in *DeBose v. Bear Valley Church of Christ,* 890 P.2d 214 (Colo.App. 1994), concerning the Establishment Clause (Appendix C). The Colorado Supreme Court denied the petitioner's Petition for Certiorari on the Establishment Clause issue (Appendix I), so the Colorado Court of Appeals' decision is the final decision in the state court on that issue.

The Colorado Court of Appeals was reviewing the judgments entered against the defendants in the District Court for the City and County of Denver, State of Colorado, in Civil Action No. 91-CV-4346. The defendants in the underlying case were Homer Wolfe, a minister of the Church of Christ, and the Bear Valley Church of Christ, an autonomous church of the Church of Christ denomination, by which Mr. Wolfe was employed at the time of the events in question. The plaintiffs were John DeBose[1] and his mother, Denise DeBose.

The underlying case arose out of pastoral counseling provided by the petitioner, Homer Wolfe, to John DeBose. Mr. Wolfe was sued on theories of breach of fiduciary duty and outrageous conduct. At that time, the trial court took guidance from the Colorado Supreme Court's decision in the earlier case of *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and allowed those claims to go forward against Mr. Wolfe, rejecting efforts to invoke and apply the Religion Clauses of the First Amendment to the United States Constitution. (The plaintiffs also sued the Bear Valley Church of Christ. The church was and is represented by separate counsel. The church is currently pursuing certiorari review in a separate filing to this court.)

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[1] In the captions of pleadings filed in the Denver District Court, John Debose was referred to by his initials, J.D.B., because he was then a minor. (His date of birth was October 25, 1974.) That configuration was carried through into the Colorado Court of Appeals and later the Colorado Supreme Court, although under Colorado law (C.R.S. § 13-22-101), Mr. DeBose actually reached majority on October 25, 1992, his eighteenth birthday. He is now 22 years old, and any need for anonymity based on minority has passed.

At trial, the plaintiffs alleged that Mr. Wolfe engaged in inappropriate conduct while administering pastoral counseling, consisting of the administration of massage to the counselee, with some further allegations of "sexualized" touching and improper counseling techniques. Mr. Wolfe acknowledged that he had sometimes administered massage to counselees in the course of pastoral counseling, to facilitate the counselees' contact with God. He did not recall administering massage to John DeBose, and he so testified. However, Mr. Wolfe also testified that, if he engaged in any touching of John DeBose, it would have been for the purpose of administering massage, for the purpose of fostering John's communion with God.

At trial, Wolfe testified that he has never tried to provide secular counseling, that his counseling has always been religiously-oriented. See Vol. 13, 11:8-15:10. In their testimony, the DeBoses' experts actually acknowledged the unique nature of pastoral counseling, because of its roots in religious beliefs and institutions. [Testimony of Reverend Marie Fortune, Vol. 11, 16:8-20, and testimony of Randy Sims, Vol. 11, 72:14-16.] These witnesses wanted to curb the use and scope of pastoral counseling because of perceived dangers associated with its spiritual underpinnings, but the fact remains that even they acknowledged those spiritual underpinnings.

The DeBoses' main attack on Wolfe was that they consider it inappropriate to touch a counselee. This highlights a fundamental distinction between pastoral counseling and secular counseling. In explaining his pastoral counseling philosophies regarding hugging and massage, Mr. Wolfe stated that:

"[Touching] is one of the best ways to communicate – of communicating your care and concern for the other person. We have been created in the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody – say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're important, you're somebody, you have value, and that's something everybody needs."

Vol. 13, 15:13-23. He did not intend anything sexual by this touching, however. Vol. 13, 16:8, 14:25. With respect to massage, he testified as follows:

"Q. Did you sometimes – well, I think I already established you sometimes did use massage in connection with counseling. When did you start using that practice? How did it come to your attention that it could be useful?

"A. I guess it would be as my own two sons were growing up in their preadolescent and adolescent years, that they had normal problems at that age, unable to communicate and perhaps not being able to as well as they would like; and massaging their backs and legs in order to relax them, it helped a great deal in our communication. We became very close, and we're still very close today. They grew up to be fine Christian young men.

"Q. Now, when you – after that experience in your own family, when – how did it come about that you began to use it occasionally in connection with counseling?

"A. How did it come about?

"Q. That you began to use it sometimes in counseling people?

"A. Oh. Well, I find that people, were uptight and a little bit fearful of what is going on. People are, at first, in counseling somewhat fearful. It helps to relax them and helps them to communicate.

"Q. In other words, if a person in counseling seems to be having trouble telling you what's wrong or going about what's needed in order to help themselves and have you help them, you have found that on some occasions massage will cause them to relax and communicate better?

"A. Yes, sir, that's correct.

Vol. 13, 16:9-17:11.

The DeBoses also attacked Wolfe for a pastoral counseling technique Wolfe employed with at least one counselee, which involved observing and praising body parts to overcome an unhealthy sense of shame. Wolfe explained that this technique had religious underpinning:

"And I was not – the techniques that I used were not 100 percent based on the Bible. What I'm trying to say is that there are biblical principles involved here concerning humanity, human sexuality, and self-image emotional problems that people have, and it's rather complex.

. . . .

"I didn't learn the principle from that, which is in Scripture. I saw that as fitting in the Scripture."

Vol. 9, 74:4-9, 74:17-18.

The DeBoses also attacked Wolfe for a pastoral counseling technique employed with at least one counselee, which involved inspection of an adolescent counselee's circumcision, to assure him that the appearance of his male organ was not abnormal. Wolfe explained the religious underpinning of this technique. Vol. 13, 53:7-54:5.

In counseling adolescents, it is sometimes necessary to determine what is actually troubling a particular counselee, which is not always easy. Vol. 13, 18:6-12. Adolescents generally are not preoccupied by the nuances of scriptural interpretation, but about the realities of coming of age, socially, sexually, and emotionally. Mr. Wolfe's pastoral counseling was administered with a pragmatic understanding of that practical reality, but it was nevertheless pastoral counseling. Mr. Wolfe expressly stated that he was not a trained psychologist (Vol. 9, 84:5-8), although he had made an effort to familiarize himself with the literature of psychology to assist him in his role as a pastoral counselor, and that his role as a pastoral counselor was to bring individuals closer to God:

> "That was my entire basic goal, to get people back to God, in communication with him, living with him and for him; and all the counseling I did was designed to do that. And, of course, the only ways that God speaks – letting him be responsible, let him keep his promises, learning our – helping other people to learn how to open their hearts."

[Vol. 13, 42:21-43:2.]

Defense counsel argued in the trial court that, under these circumstances, the claims against Mr. Wolfe were subject to the religion clauses of the First Amendment, under which these causes of action should not be allowed to go forward at all.

Defense counsel argued that, at a minimum, the jury should be instructed on the Free Exercise Clause, with directions to determine whether Mr. Wolfe's actions were sincerely religiously motivated, based on *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). The trial court rejected all arguments based on the religion clauses, in reliance on *Destefano v. Grabrian*, *supra*, and

submitted the case to the jury for determination. The jury returned verdicts in favor of the plaintiffs.

Counsel representing Mr. Wolfe and the Bear Valley Church of Christ commenced separate appeals to the Colorado Court of Appeals. Those appeals were assigned Case Nos. 92-CA-1929 and 92-CA-1935. The two appeals were then consolidated together by the Colorado Court of Appeals.

After the briefs were filed in the Colorado Court of Appeals, the Colorado Supreme Court handed down another decision which had an effect on the issues raised on appeal, *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert.den., ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).

Based on the Colorado Supreme Court's earlier decisions in *Destefano v. Grabrian* and *Moses v. Diocese of Colorado, supra*, the Colorado Court of Appeals rejected defendant Wolfe's argument based on the Establishment Clause in the First Amendment. See 890 P.2d at 221. This holding was based on the "neutral principles" analysis previously adopted by the Colorado Supreme Court in *Moses v. Diocese, supra*:

> "Relying upon *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), . . . [the Church] and Wolfe argue that allowing civil judgments against pastoral counselors and their churches, based upon conduct occurring during counseling sessions, could so 'entangle' the government with religious practices as to violate the establishment clause of the First Amendment.
>
> "This argument has been rejected by our supreme court in *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994), a decision rendered after the parties' briefs were filed in

this court. There, our supreme court concluded that:

> "Application of a secular standard to secular conduct that is tortious is not prohibited by the constitution. The Supreme Court has not granted churches broad immunity against being sued in civil courts. Civil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record.
>
> "*Moses v. Diocese of Colorado, supra,* at 320-21 (citations omitted). See also *Bishop & Diocese v. Mote*, 716 P.2d 85 (Colo. 1986), *cert. denied*, 479 U.S. 826, 107 S.Ct. 102, 93 L.Ed.2d 52 (1986).
>
> "We consider Moses to be dispositive of the defendants' establishment clause assertions here."

890 P.2d at 221.

The Colorado Court of Appeals did rule in favor of Mr. Wolfe with respect to the Free Exercise Clause in the First Amendment. The Court of Appeals did not hold that the Free Exercise Clause provided automatic or absolute protection. However, the court agreed with Wolfe that the jury should have been instructed as to the effect of the Free Exercise Clause *if* it found Wolfe's conduct to be sincerely religiously motivated, he could not be found liable:

> "[T]he jurors should be instructed that, if Wolfe touched the minor only in the manner in which he described touching other counselees, that such touching was engaged in solely in a sincere effort to facilitate the minor's communication with God, and that Wolfe was not motivated by

> any personal desires, then the jury must conclude that Wolfe did not violate any fiduciary duty owed to the minor or to his mother nor did he engage in any outrageous conduct toward either of them."

890 P.2d at 222. This would be consistent with the holding of *United States v. Ballard, supra,* that the correctness of a religious belief cannot be questioned, although the jury may be called upon to decide whether the defendant's conduct actually was motivated by that belief, as opposed to a different motive. Counsel for Mr. Wolfe acknowledge that the free exercise clause can be invoked only when the party invoking it claims that his conduct was motivated by a sincerely held religious belief. However, Mr. Wolfe has maintained that any touching of John DeBose was religiously motivated.

Each of the parties to the consolidated appeals in the Colorado Court of Appeals filed a Petition for Certiorari with the Colorado Supreme Court. Counsel for Mr. Wolfe requested certiorari review of the Establishment Clause issue. Counsel for the DeBoses requested certiorari review of the Court of Appeals ruling on the free exercise issue. The Colorado Supreme Court granted certiorari to review the issues raised by the DeBoses, but rejected all of the defendants' issues. That left in place the Colorado Court of Appeals' ruling on the Establishment Clause.

Because of the way the First Amendment issue was framed, defense counsel understood the court to be accepting, for purposes of its constitutional analysis, that the conduct would be considered religiously motivated. In the final order defining the issues on which certiorari was granted (Appendix T), the First Amendment issue was defined as follows:

> "Whether the First Amendment provides a defense to tort claims if the alleged tortious

> conduct is motivated by a sincerely held religious belief."

In Mr. Wolfe's first brief in the Colorado Supreme Court, defense counsel noted the understanding that this issue focused on the Free Exercise Clause, since religious belief or motivation is only critical to that clause, and that the issue as framed took the existence of religious motivation as a given, proceeding from there to the question of whether, *if* the conduct *was* religiously motivated, the free exercise clause would bar the breach of fiduciary duty and outrageous conduct claims. See Appendix U.

In *Moses v. Diocese of Colorado, supra,* the Colorado Supreme Court had previously ruled that various causes of action could go forward, based on the "neutral laws of general applicability" analysis recognized in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Defense counsel understood it to be the Colorado Supreme Court's intention to focus on the question of whether these causes of action, as applied to impose liability on a clergyman under these circumstances, would constitute "neutral laws of general applicability," or, if not, whether they would satisfy the requirements of the compelling state interest test.

When the Colorado Supreme Court handed down its decision, it ruled as a threshold matter that, even if Mr. Wolfe's explanation of his massaging of counselees were to be accepted, he still had "posited no religious basis for his massage technique." (Appendix A, p. 13.) The court's treatment of this issue was as follows:

> "Based on our review of the testimony and other evidence presented at trial, we agree with the dissent to the court of appeals' opinion that 'Wolfe posited no religious basis for his massage technique.' *Id.* at 236 (Davidson, J., dissenting).

Wolfe testified as to why he used massage techniques on counselees. He began by generally addressing "the subject of touching among human beings;"

> "I believe that it is one of the best ways to communicate – of communicating your care and concern for the other person. WE have been created in the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody – say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're important, you're somebody, you have value, and that's something everybody needs.

Wolfe explained that the purpose of massaging a counselee 'is to increase the value and the ability to communicate, both to hear and to share.' Under questioning from his own counsel, Wolfe then explained why he began to massage counselees:

> "Q. Did you sometimes – well, I think I already established you sometimes did use massage in connection with counseling. When did you start using that practice? How did it come to your attention that it could be useful?
>
> "A. I guess it would be as my own two sons were growing up in their preadolescent and adolescent years, that they had normal problems at that age, unable to communicate and perhaps not being able to as well as they would like; and massaging their backs and legs in order to relax them, it helped a great deal in our communication. We became very close, and we're still very

close today. They grew up to be fine Christian young men.

"Q. Now, when you – after that experience in your own family, when – how did it come about that you began to use it occasionally in connection with counseling?

"A. How did it come about?

"Q. That you began to use it sometimes in counseling people?

"A. Oh. Well, I find that people, were uptight and a little bit fearful of what is going on. People are, at first, in counseling somewhat fearful. It helps to relax them and helps them to communicate.

"Q. In other words, if a person in counseling seems to be having trouble telling you what's wrong or going about what's needed in order to help themselves and have you help them, you have found that on some occasions massage will cause them to relax and communicate better?

"A. Yes, sir, that's correct.

Wolfe also described massaging another young counselee and maintained that 'the whole purpose of it was for the purpose of concentrating on communication.' Similarly, Wolfe testified that he 'probably' suggested to an additional young counselee that he remove his pants 'because through denim jeans and hard fabrics you don't get contact, and the whole thing here is – the purpose of [massage] is to assist in communication.'

"Evidenced by the testimony presented at trial, Wolfe never asserted a religious belief for

his utilization of massage techniques with counselees.[2] As noted in the dissent to the court of appeals' decision"

> "According to the record, even though he claimed that he could not remember using massage on the minor plaintiff, Wolfe explained that he used massage to assist his counselees in communicating their problems to him so he could help them. Since he

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[2] Wolfe's attorney, in the course of opening statements, explained Wolfe's use of therapeutic massage techniques in counseling in terms of wholly secular reasons:

> "And Homer [Wolfe] did learn in his counseling that sometimes if a person was having trouble communicating with him, he couldn't break through the inhibitions or impediments to be able to communicate or receive communications from the counselee, he also found that hugging or massaging would sometimes be of assistance in helping people to relax and communicate. In fact, I think Homer's testimony will be that he had first discovered the success of massaging as a means of helping people to communicate when his own sons were growing up, and at times, as all adolescents or pre-adolescents do, go through a period of time when they may feel rebellious or dissatisfied with the acceptance of authority. And there would be times when his sons were not able to respond to efforts to discuss things and bring them out into the open, and he found that if he would massage them, it helped them to relax, and then they were able to communicate in many things that might have otherwise become problems that we hear about so much of teenagers, who not only become rebellious but would act on their rebellion. Those circumstances were averted in Homer's family, and he had a very happy married life, and his sons were happy and grew up to be happy men, who now have happy families of their own, because Homer had the wisdom to help them to communicate.

> believed human touch to be one of the best methods of communication between people, he chose this type of massage to help counselees relax and, consequently, communicate more freely with him.
>
> "Thus, although his ultimate goal in spiritual counseling was for counselees to receive help from God in resolving their problems, by Wolfe's own testimony, his choice to use massage with children had no biblical, doctrinal, or spiritual basis, justification, or underpinning. Despite the religious setting, the described massage technique simply reflects Wolfe's choice of a relaxation and communication method between himself and his counselees.
>
> *Id.* at 236 (Davidson, J., dissenting) (emphasis in original). We agree with those observations and conclusions."

(Appendix A, pp. 13-17.) This holding was footnoted with footnote 12, indicating the issues which the Colorado Supreme Court did not reach, based on its determination that there was no "religious belief":

> "In view of our determination that Wolfe never asserted a religious belief for his utilization of massage techniques with young counselees, we will not address several arguments of the parties, including whether (1) Wolfe engaged in religious 'conduct' or 'belief,' *compare DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 220 (Colo.App. 1994) *with Debose*, 890 P.2d at 236-38 (Davidson, J., dissenting), and any resulting implications; (2) the trial court was obligated to provide the jury with a First Amendment instruction that was not tendered by the defendants; (3) the torts of breach of

> fiduciary duty and outrageous conduct are religion-neutral laws according to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 876-82 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, (508 U.S. 520, 540-42 (1993), and any resulting implications; and (4) the compelling state interest test required by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1993), is constitutional and supersedes *Smith*, and if so, whether we could apply RFRA to this case retroactively, *but see Van Osdol v. Vogt*, 908 P.2d 1122, 1130 n.12 (Colo. 1996) (RFRA inapplicable to events preceding its passage)."

Appendix A, p. 17.

Counsel for Mr. Wolfe applied for a rehearing on this ruling, on the basis that a religious motivation was sufficiently demonstrated, and that, if the Colorado Supreme Court was not persuaded that there was a religious motivation, that issue should be more fully briefed and argued. (Appendix V.) As noted, the way the issue was framed, defense counsel understood this threshold question to be beyond the scope of the issue on certiorari review. If the court was broadening the issue framed, defense counsel felt it would be desirable to have the opportunity to brief that point in greater detail. The petitions for rehearing were denied on January 13, 1997. (Appendix B.)

Manner in Which Federal Questions Were Raised

The First Amendment issues were raised in the trial court by pre-trial motion, by argument during trial, by motions for directed verdict during trial, by jury instructions tendered by counsel for defendant Wolfe, and by post-trial motions. The trial judge rejected all efforts to invoke First Amendment protection. Relevant portions of

the record are set forth in Appendices E through N, in accordance with Rule 14.1(g)(i).

The First Amendment issues were raised in the Colorado Court of Appeals in Wolfe's Notice of Appeal, in his briefs, and in his Petition for Rehearing. Relevant portions of the record are set forth in Appendices C, D, and O through R, in accordance with Rule 14.1(g)(i). The Court of Appeals rejected Wolfe's Establishment Clause argument, citing the earlier Colorado Supreme Court decisions as dispositive, but accepted Wolfe's Free Exercise Clause argument. The Colorado Court of Appeals' decision is appended hereto in Appendix C.

The Establishment Clause issue was raised in the Colorado Supreme Court in Wolfe's Petition for Certiorari, but the Colorado Supreme Court did not grant certiorari on that issue. Wolfe's Petition for Certiorari is set forth in Appendix S, in accordance with Rule 14.1(g)(i).

The DeBoses sought review by the Colorado Supreme Court of the Free Exercise Clause issue, and the Colorado Supreme Court granted certiorari on a narrow Free Exercise issue. The petitioner's position concerning the Free Exercise Clause was set forth in briefs filed in the Colorado Supreme Court. (Appendix U.)

The Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb) was enacted November 16, 1993, after the briefing had been closed in the Colorado Court of Appeals. However, the Colorado Court of Appeals was made aware of the statute, and its potential effect on this case, in Appellant Wolfe's Citation of Supplemental Authority filed January 31, 1994. (Appendix Q.) Judge Taubman's concurring opinion in the Court of Appeals acknowledged the applicability and effect of the Religious Freedom Restoration Act, and that concurring opinion is included in Appendix C. (Footnote 12 in the

Colorado Supreme Court's decision listed the constitutionality and retroactivity of RFRA among the issues which the court did not reach because of its threshold determination "that Wolfe never asserted a religious belief for his utilization of massage techniques with young counselees. . . . " (See Appendix A.)

The First and Fourteenth Amendments are set forth in Appendix AA, and the Religious Freedom Restoration Act is set forth in Appendix BB, in accordance with Rule 14.1(f) in the Rules of the Supreme Court of the United States.

ARGUMENT

The petitioner now respectfully requests that this court review the ruling of the Colorado Supreme Court relating both to the Free Exercise Clause and the ruling of the Colorado Court of Appeals regarding the Establishment Clause. These are important questions of federal law which have not been, but should be, settled by this Court; or which, by inference from available United States Supreme Court precedents, have been decided in a way which conflicts with applicable decisions of this Court; or which have been decided by the Colorado state courts in a way that conflicts with the decisions of other state and federal courts. (See Rule 10.1(b) and (c) in the Rules of the Supreme Court of the United States.) Specifically, the petitioner's arguments are as follows:

1. The petitioner made a sufficient showing of religiously motivated conduct to require that the causes of action for "breach of fiduciary duty" and "outrageous conduct," as applied to impose liability on him, be analyzed under the Free Exercise Clause in the First Amendment to the United States Constitution, as interpreted by the United States Supreme Court and as affected by the Religious Freedom Restoration Act.

The petitioner certainly acknowledges that, to invoke the Free Exercise Clause, and/or the Religious Freedom Restoration Act, he must demonstrate that his conduct was religiously motivated. The petitioner also acknowledges that, under *United States v. Ballard, supra,* the question of whether his assertion of religious motivation is sincere (i.e., whether his conduct was in fact prompted by the asserted religious motivation), is a question of fact. However, the petitioner submits that he made a sufficient showing of religious motivation to at least trigger Free Exercise analysis in this case, and thus to trigger the requirement that the *jury* determine whether his assertion of religious motivation is sincere. The Colorado Court of Appeals, which ruled in favor of the petitioner on this issue, evaluated the "religious motivation" question this way:

> "Whether a person's beliefs are 'religious' for purposes of the First Amendment, or are based simply upon moral or political values, is a question for the court. However, in construing the free exercise clause, the term 'religion' has received an expansive interpretation. See *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (for purpose of exemption from draft, a 'religious' belief is simply the 'ultimate,' imperative, belief of an individual; belief

in an external power not necessary). Thus, beliefs are 'religious' for First Amendment purposes even if they are not acceptable, logical, consistent, or comprehensible. Only claims 'so bizarre, so clearly nonreligious in motivation' should be denied free exercise protection. *Thomas v. Review Board*, 450 U.S. 707, 715, 101 S.Ct. 1425, 1531, 67 L.Ed.2d 624, 632 (1981). See also Note, *Toward a Constitutional Definition of Religion*, 91 Harv.L.Rev. 1056 (1978).

"Here, Wolfe's reliance upon the efficacy of massage as a means of enhancing communication with God may more accurately be described as a 'practice,' rather than as a 'belief.' Nevertheless, if his testimony is accepted, that this is a technique that he has found to be useful in furthering such communication, the practice has just as much a religious basis as would the practice of those who assume that a moment of silence facilitates such communication.

"Further, if Wolfe's belief in such a practice is sincere, there need be, contrary to the views of the trial court, no necessity for further evidence to establish a 'religious or Biblical justification' for the practice. On the contrary, if the belief or practice can be classified as religious, courts may not inquire into the validity of such belief or practice. *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); *Wolf v. Rose Hill Cemetery Ass'n*, 832 P.2d 1007 (Colo.App. 1991)."

890 P.2d at 220.

In *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 1604, 108 L.Ed.2d 876 (1990), this court stated as follows:

"It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free

> exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' *United States v. Lee*, 455 U.S. 252 at 263 n.2, 102 S.Ct. 1051 at 1058 n.2, 87 L.Ed. 1628 (1982) (STEVENS, J., concurring). As we reaffirmed only last Term, '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.' *Hernandez v. Commissioner*, 490 U.S. at 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, e.g., *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707 at 716, 101 S.Ct. at 1425, 67 L.Ed.2d 624 (1981); *Presbyterian Church v. Hull Church*, 393 U.S. 440 at 450, 89 S.Ct. 601 at 606-07, 21 L.Ed.2d 658; *Jones v. Wolf*, 443 U.S. 595, 602-606, 99 S.Ct. 3020, 3024-3027, 61 L.Ed.2d 775 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87, 64 S.Ct. 882, 885-87, 88 L.Ed. 1148 (1944)."

The petitioner also calls the court's attention to the decisions in *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); *Haff v. Cooke*, 923 F.Supp. 1104 (E.D.Wis. 1996); *Muslim v. Frame*, 891 F.Supp. 226 (E.D.Pa. 1995), and 897 F.Supp. 215 (E.D.Pa. 1995); and *Jesus Center v. Farmington Hills Zoning Board of Appeals*, 544 N.W.2d 698 (Mich. App. 1996).

If this court ultimately agrees with the petitioner that the petitioner has made a sufficient showing to create a question of fact as to whether his conduct in the course of pastoral counseling was religiously motivated, it will then be necessary to analyze these causes of action for breach of fiduciary duty and outrageous conduct, under the Free Exercise Clause, as argued by the petitioner in the state courts. Counsel for the petitioner have argued in the state courts that, as applied to impose liability on him, these are not "neutral laws of general applicability," taking this case outside the holding of *Employment Division v. Smith, supra;* that this necessitates resort to the Compelling State Interest Test [see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)]; that in any event the Religious Freedom Restoration Act applies retroactively to require use of the compelling state interest test as embodied in that statute; and that under a compelling state interest analysis these causes of action should not be allowed to go forward. However, since the Colorado Supreme Court did not reach these issues [see footnote 12, quoted above at pp. 15-16], the petitioner acknowledges that a remand for further consideration would be necessary, if this court finds a showing of religious motivation to trigger further Free Exercise analysis.[3]

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[3] The Colorado Supreme Court's decision in *Moses v. Diocese of Colorado, supra,* may suggest how that court would rule on these issues, but the footnote in *Bear Valley Church of Christ v. DeBose* indicates that the court reserved judgment on all these issues raised by the petitioner in the state court with respect to the Free Exercise Clause.

2. The causes of action for "breach of fiduciary duty" and "outrageous conduct," as applied to impose liability on the petitioner, are not "neutral principles," making it necessary to analyze them under the Establishment Clause in the First Amendment to the United States Constitution.

By recognizing these subjective causes of action against a clergyman, and by enforcing the judgment against the clergyman, the Colorado Supreme Court is effectively undertaking to regulate the permissible conduct of a clergyman because of his status as a clergyman, and this violates the establishment clause of the First Amendment, as applied to the states under the Fourteenth Amendment.

In *Destefano v. Grabrian, supra,* the Colorado Supreme Court recognized the potential constitutional problems with a claim for "clergy malpractice," and declined to recognize such a cause of action on that basis. 763 P.2d at 285. However, in that case and later in *Moses v. Diocese of Colorado, supra,* the Colorado Supreme Court recognized and upheld causes of action for breach of fiduciary duty and outrageous conduct which have the same constitutional infirmities. See *Dausch v. Rykse,* 52 F.3d 1425 (7th Cir. 1994), and *Schmidt v. Bishop,* 779 F.Supp. 321, 326 (S.D.N.Y. 1991). A claim for breach of fiduciary duty requires the jury to determine whether the clergyman has violated a fiduciary duty which is derived from his status as a clergyman. By its nature, a fiduciary duty must be traceable to a particular undertaking. There are no generalized fiduciary duties in the absence of a special relationship. In a case against a clergyman, the special relationship is the relationship between the clergyman and a member of his congregation, or, in this case,

between the clergyman and a member of the congregation to whom he is providing pastoral counseling. The Colorado Supreme Court's solution to this problem has been to say that breach of fiduciary duty is a "neutral principle," bringing the case within the holding of *Presbyterian Church v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). However, a "neutral principles" analysis presupposes that there is a legal principle which is a matter of general application, which can be applied to a dispute involving a religious institution or a clergyman, without regard for the institution's or clergyman's status as such, or even in spite of that status. Where the plaintiff must make reference to the status of a clergyman as such in order to demonstrate the existence of a fiduciary duty, that is not a neutral principle which applies without regard for the clergyman's status. The cause of action depends on the clergyman's status.

The Colorado Supreme Court has attempted to distinguish between the impermissible "clergy malpractice" claim and of what it perceives a permissible claim for breach of fiduciary duty on the basis that breach of fiduciary duty does not require proof of a subjective standard of care. In *Moses v. Diocese*, defense counsel raised the argument that the manifestation of "breach of fiduciary duty" recognized in *Destefano v. Grabrian* was simply another way of denominating a claim for clergy malpractice. The Colorado Supreme Court rejected that argument, on the basis that the clergyman's liability for breach of fiduciary duty was unrelated to his "professional" status as a clergyman, which the court said would justify treating that claim differently from a claim for "clergy malpractice":

> "The fundamental difference between the two causes of action is the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional standard of care. In *Destefano*, we held the defendant owed a fiduciary duty to the plaintiff that 'was created by his **undertaking to counsel** [the plaintiff].' *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). The **position of trust** occupied by the defendant, when coupled with his **positive act of counseling** the plaintiff, resulted in a duty to the plaintiff. The relevant common facts in *Destefano* and Tenantry's case are not the profession of the defendants; the relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty. In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not. Id. at 384-86."

863 P.2d at 321, footnote 13 (emphasis supplied). However, this only shifts the responsibility for setting the standard of care from expert witnesses to the court, which must instruct the jury as to the nature and extent of the applicable fiduciary duty, and the conduct which will constitute a breach of that fiduciary duty. Just as Father Grabrian's "position of trust" in *Destefano v. Grarian was* his position as a Catholic priest, and the counseling he undertook was *pastoral counseling*, Bishop Frey's "position of trust" in the *Moses* case was his "superior position **as a counselor, a bishop, and a final arbiter of problems with the clergy.**" 863 P.2d at 322 (emphasis added). The court referred to Bishop Frey's "position of authority in the church," which gave him "the power to resolve conflicts in the church." Id. The court also

referred to the plaintiff's belief that Bishop Frey "had the power to decide if she would lose her salvation." Id. The court also stated that, although the "clergy-parishioner" relationship is not necessarily a "fiduciary" relationship, it does "involve the type of interaction that creates trust and reliance," and ended with the statement that "Courts *have* recognized the fiduciary nature of the clergy-parishioner relationship." Id. Therefore, even though the black and white statement of the expanded cause of action for "breach of fiduciary duty" may suggest facial neutrality, when this tort cause of action is applied to clergymen it is not neutral. When a clergyman is sued for breach of fiduciary duty, it is his *status* as a clergyman which allegedly gives rise to the existence of a fiduciary duty, and plaintiffs' counsel generally make the effort (as they did in this case) to establish the existence of a pastoral counseling relationship, since that is the one context in which the Colorado Supreme Court has found this new species of fiduciary duty. A civil claim for breach of fiduciary duty which grows out of that religious status cannot possibly constitute a neutral law of general applicability. As applied to the individual defendant, the fiduciary duty is premised on his status as a clergyman, and more particularly on his status as a clergyman providing pastoral counseling.

When the Colorado Supreme Court held that a clergyman could be sued for breach of fiduciary duty based on his conduct (especially sexual conduct) toward a member of his congregation, it was ripping the concept of fiduciary liability free from its conventional moorings, and re-anchored it in an entirely new position. Historically, fiduciary liability has been imposed where one person exercises control over the financial affairs of another. See Appendix W; see, also, N. Schaumann, *The*

Lendor As Unconventional Fiduciary, 23 Seton Hall L. Rev. 21 (1992). This new form of fiduciary liability exports the terminology of "breach of fiduciary duty" to a context where no financial relationship is involved, and where the "breach" has nothing to do with finances. Defense counsel acknowledge that the Colorado Supreme Court is the ultimate arbiter of Colorado common law, and, as such, has the power to create a new cause of action or to redefine an existing cause of action. However, if there is a constitutional question with respect to such a cause of action, this court, and not the Colorado court, ultimately decides that constitutional question. Except when this new form of fiduciary liability is needed to impose liability on a clergyman or religious institution, fiduciary liability is still generally limited to situations where the defendant exercised control over the plaintiff's financial affairs, and abused that power to the plaintiff's financial detriment. See, e.g., *Rubenstein v. South Denver Nat'l Bank,* 762 P.2d 755 (1988), cert. den. (1989); and *Zick v. Krob,* 872 P.2d 1290 (Colo.App. 1993). The Supreme Court's Committee on Civil Jury Instructions has created an entirely new chapter (Chapter 26, C.J.I. Civil 3d) to deal with breach of fiduciary duty. (See Appendix X, containing Instruction 26:1, 26:2A, and 26:3.) The transformed freestanding cause of action understood to have been recognized in *Destefano,* and reaffirmed in *Moses,* is treated separately. (See Instructions 26:2B, in Appendix Y.) With the exception of the *Destefano* and *Moses* decisions, all of the cases imposing fiduciary liability still involve a "fiduciary" who exercised some control over the plaintiff's *financial* affairs.

If there is any residual sense that the cause of action for breach of fiduciary duty may be a "neutral principle"

because it applies to everyone who functions in a fiduciary capacity, the court should look at the Colorado decisions in *Crystal Homes v. Radetsky*, 895 P.2d 1179 (Colo.App. 1995); *Awai v. Kotin*, 872 P.2d 1332 (Colo.App. 1993); and *Spoor v. Serota*, 852 P.2d 1292 (Colo.App. 1992). In each of those cases, the Colorado Court of Appeals declined to hold a lawyer, or a doctor, or a psychologist liable for breach of fiduciary duty, since those professionals could be sued for malpractice. Thus, as uniquely applied to impose liability on a clergyman, this new form of "fiduciary" duty is not a "neutral principle."

The same applies to the tort of "outrageous conduct." This tort has no guiding principle beyond the jury's sense that the defendant has engaged in "extreme and outrageous conduct," that he engaged in the conduct recklessly or with intent to harm the plaintiff, and that the plaintiff as a result suffered severe emotional distress. (Instructions 23:1 and 23:2 from the Colorado Jury Instructions 3d (Civil), are included in Appendix Z.) The plaintiffs have relied on the petitioner's status as a clergyman to establish the "extreme and outrageous" nature of the alleged conduct. Thus, as applied to a clergyman, that is not a neutral principle which applies without regard for the clergyman's status. The petitioner respectfully requests that this court review the Colorado Supreme Court's "neutral principles" analysis, to determine whether this will successfully avoid an establishment clause analysis.

If this court ultimately agrees with the petitioner that, as applied to impose liability on the petitioner, the causes of action for breach of fiduciary duty and outrageous conduct are not "neutral principles," it will then be necessary to analyze these causes of action under the Establishment Clause, as argued by the petitioner in the

state courts. Counsel for the petitioner submit that, under the *Lemon* test, the recognition of these causes of action at a minimum produces an entanglement between government and religion, with government undertaking to regulate what conduct is permissible by clergymen and religious institutions, and that the earlier prongs of the *Lemon* test may likewise be implicated. The claims for breach of fiduciary duty and outrageous conduct depend on the clergyman's or religious institution's status as such, and thus involve a de facto regulation of religion. However, since the Colorado courts have never reached the stage of applying the Establishment Clause, analyzing the proper standard and applying that standard to evaluate these causes of action, the petitioner acknowledges that a remand for further consideration would be necessary, if this court rejects the "neutral principles" circumvention.

Counsel for the petitioner certainly are not attempting to argue that a clergyman has constitutional immunity from all tort liability. If a clergyman is involved in an automobile accident, he could certainly be sued for negligence, because the negligence cause of action is genuinely a neutral principle, which applies without regard for the defendant's status as a clergyman. Likewise, if a clergyman were to shoot or rape another person, whether or not such a person was a member of his congregation of a counselee, he could be criminally prosecuted for the crime of homicide or sexual assault. Those criminal offenses would be neutral principles, which would apply to the clergyman, as to anyone else, and would apply without regard for his status as a clergyman. In those scenarios, the clergyman could also be sued in a civil action for battery. That cause of action would apply without regard for his status as a clergyman. However, any

cause of action which depends on the clergyman's status as such is no longer a neutral principle, and clearly does entangle the government in the regulation of religion. Whatever formulation is used, the imposition of such liability necessarily implicates the Establishment Clause.

CONCLUSION

Therefore, the petitioner respectfully requests that this court grant certiorari to review the Colorado state courts' rulings as to the threshold issues affecting application of the Religion Clauses of the First Amendment to the United States Constitution to this and other similar cases.

Respectfully submitted,

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APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 95SC42 December 23, 1996

BEAR VALLEY CHURCH OF CHRIST,
a Colorado corporation, Petitioner/Cross-Respondent,

v.

DENISE DeBOSE, and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, Respondents/Cross-Petitioners,

and

HOMER WOLFE, Respondent/Cross-Petitioner.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

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JUSTICE LOHR delivered the Opinion of the Court.

This case presents constitutional, evidentiary, and jury instruction issues arising from the trial of tort claims brought against a religious institution and one of its former pastors. The plaintiffs, a mother and her son, filed suit against their former church and the pastor, alleging a variety of tortious offenses stemming from the pastor's conduct during counseling sessions with the son. The trial court allowed a jury to consider the claims, and the jury returned several verdicts for the plaintiffs. In a divided opinion, the Colorado Court of Appeals reversed the judgment entered on the verdicts and remanded the case for a new trial. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 218, 231 (Colo. App. 1994). We granted certiorari and now reverse the judgment of the court of appeals and remand with directions to reinstate the trial court's judgment.

I.

Several families organized and incorporated the Bear Valley Church of Christ (Bear Valley) in 1962. Bear Valley is an autonomous church, administered by a panel of elders whose responsibilities are to oversee and shepherd

the activities and fellowship of the Bear Valley congregation. In 1981, Bear Valley hired Homer Wolfe to head a new Family Life Ministry and to engage in counseling efforts. Wolfe and the Family Life Ministry operated under the direct supervision and authority of the Bear Valley elders.

In 1981, the same year that the elders hired Wolfe, Denise DeBose joined the Bear Valley congregation. DeBose sought counseling with Wolfe in 1984 to discuss her marital problems. She found Wolfe's counseling to be satisfactory, but for other reasons changed counselors. DeBose brought her son (DeBose child, or child)[1] to Wolfe for counseling once in 1984, and then, as DeBose testified, "on a consistent basis, but sporadically throughout the year" from the fall of 1985 until Bear Valley terminated Wolfe's employment in June of 1988. The impetus for the counseling was Wolfe's request to see the child in counseling and Debose's concern that her child's poor scholastic performance reflected the turmoil of her marriage. During her child's first counseling session with Wolfe, DeBose observed through a window to Wolfe's office that her child was crying and that Wolfe was holding and comforting the child.

According to the child, Wolfe engaged in a pattern of inappropriate touching during the child's counseling sessions. The child testified that in the first couple of counseling sessions with Wolfe, "he would sit me on his lap

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[1] The DeBose child was born on October 25, 1974. He therefore was about eleven years old when he began counseling sessions with Wolfe.

and rub my back and my leg."[2] The child explained that sometime before the fall of 1987, Wolfe "slid [my] shirt up," and "rubbed me up underneath my shorts, by my penis and on my back," that Wolfe "would rub my leg up to my side and just touch my penis," and that Wolfe touched his "privates." The child testified that Wolfe rubbed the child's thigh "[a] lot." The child also related that during the massaging, Wolfe told him "that my mom would love me, my dad would love me, and that Jesus loved me, and [Wolfe] would love me." The child also testified that there were no counseling sessions where Wolfe did not "rub" him.[3]

Wolfe, however, testified that he never massaged or touched the child inappropriately in any way. Wolfe admitted that he examined genitalia and used massage and disrobing techniques on other counselees, but insisted that he always stopped massaging "[j]ust above the knee," because "any good thing can be carried too far, even." Wolfe maintained throughout the trial that in his counseling activities he never actually touched any client's genitals.

In May of 1987, Gary Don Wygal, Sr., met with Wolfe, an elder named "Sandy" Sanderson, and a Bear Valley instructor named Dick Brant, to complain about the methods Wolfe was employing in counseling the Wygals'

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[2] The DeBose child later amended his statement, however, by testifying that the back massages did not begin until the third or fourth counseling session with Wolfe.

[3] The child's memory regarding these events improved between the time of the child's deposition and the time of the child's testimony, after the child met with several therapists.

fourteen-year-old son. Wygal's specific complaints included the allegation that Wolfe asked to examine the youth to see if he had been properly circumcised. In contrast, Sanderson testified that Mr. Wygal never presented a definitive complaint in May of 1987 and that the Wygals' fears were a "smoke cloud" for "what [their son] was interpreting that happened."[4] Another elder, Jerry Taylor, testified that Sanderson approached him and other elders in July of 1987 with the Wygals' complaint, and that the elders understood that there were accusations of "some touching and some massaging."

The initial meeting in May of 1987 resulted in a meeting in June or July of 1987, where Wygal and his wife, Mary Wygal, met with Wolfe and the Bear Valley elders. The Wygals testified that the June or July of 1987 meeting served as a forum for the Wygals to express their concerns about Wolfe's counseling methods with their son, including Wolfe's questions regarding circumcision.[5] Mrs. Wygal testified that Wolfe explained at the June or

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[4] Sanderson so testified despite admitting that he was aware of Mrs. Wygal's express concern that her son might be the victim of sexual molestation.

[5] The record reflects that the Wygals also brought the complaints of either one or two other children to the attention of the elders during the meeting in June or July of 1987. Mrs. Wygal testified that her son appeared at the meeting to confront Wolfe with the claims of a friend who asserted that Wolfe asked "to examine him" and "rubbed his back or stroked his back." Mr. Wygal testified that he told Wolfe and the elders that a young male counselee had complained to one of the Wygals' children that "Homer [Wolfe] was rubbing on him all the time." The record is unclear whether the same child made both complaints.

July of 1987 meeting that there must be a "misunderstanding," because "he was just going to take [the Wygals' child] to a book and show him what his private parts would look like if he was properly circumcised."

Mr. Wygal testified that the elders asked the Wygals in the June or July of 1987 meeting to allow the elders to investigate the situation, "[a]nd they assured us that they would take care of it." The elders had already spoken to Wolfe in April of 1986 about the need to focus on "biblical" counseling, as opposed to "professional and medical" counseling. Although Sanderson thought that the Wygals' concerns were a "family issue" and expressed that view to the other elders, Wolfe agreed in testimony that the elders instructed him on August 13, 1987, that "they wanted it clearly to be pastoral counseling and not anything in the clinical area."[6]

Still, the elders allowed Wolfe to continue counseling those persons who were, in Wolfe's words, "sensitive" or in need of "emotional stability," including the DeBose child. Wolfe asked permission from the elders to continue his counseling in this limited fashion, and remained "open about the amount of counseling that he was doing." Wolfe testified that the elders never asked him about his counseling techniques, even after the Wygals complained, and that he would have been forthright with the elders about his methods if they had.

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[6] The minutes from the elders' August 13, 1987, meeting also include a notation that the "[e]lders postponed the class taught by [Wolfe] to a later date as a result of the recent Wygal situation."

The Wygals were not satisfied when the elders concluded after the meeting in June or July of 1987 that the Wygals' complaint was simply the product of a "misunderstanding." The Wygals were also concerned that they had never heard back from the elders regarding any resolution of the complaints voiced at the meeting in June or July of 1987. As a result, Mr. Wygal shared his concerns with his teacher at the Bear Valley School of Preaching, Jack Carter, who testified that he in turn spoke with the elders about the Wygals' complaints. Mr. Carter agreed in testimony that the elders responded that they had already placed restrictions on Wolfe "in the areas of sexual activity or sexual counseling."

The Wygals remained dissatisfied with the elders' handling of their complaints. Approximately nine months after the first meeting in June or July of 1987, the Wygals met with the elders and Wolfe again in March of 1988, and discussed, according to one of the elders, "the matter of touching," "[Wolfe's] manner of hugging the [Wygal] boy," and "massaging on the [Wygal boy's] back." Mr. Wygal testified that Wolfe explained to the elders during the March 1988 meeting that it was necessary to examine the genitals of the Wygals' son because if the boy was not properly circumcised, it could cause the boy to be "easily excited sexually." However, the elders again concluded after the March meeting that the Wygals' complaints were the product of a "misunderstanding."[7]

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[7] Sanderson's testimony regarding the various meetings differed in some respects from the other testimony presented at trial. Sanderson testified that he met first with Brant and *both* Mr. *and* Mrs. Wygal. According to Sanderson, Brant approached

Nevertheless, on March 23, 1988, the elders directed Wolfe to cease his counseling efforts "for the time being effective immediately," because of the Wygals' complaints and the complaints of the parents of another young male counselee, who claimed that Wolfe was "rubbing and massaging" their child inappropriately, and that "his genitals had been handled." The elders terminated

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Sanderson after this first meeting and informed him that there "needs to be something done that would find out what was going on with Homer Wolfe." Sanderson testified that he brought the issue to the elders' attention at the elders' next meeting. Sanderson testified that the elders then scheduled a time to speak with Wolfe, and told Wolfe that they "did not want him to be involved in clinical counseling in any way." After meeting with Wolfe, Sanderson testified, "[i]t was simply left that Homer was to follow the elders wishes and get himself in – if there was anything that was an issue or a problem with him – to get it straightened out and to do what we wanted him to do." Sanderson explained that either Brant or Mr. Wygal then requested another meeting, and that a meeting subsequently occurred between Sanderson and Mr. Wygal. Sanderson did not mention whether Brant was present at this meeting and could not remember whether Wolfe was present. Sanderson was unsure as to whether Mrs. Wygal was present at his second meeting with Mr. Wygal. Sanderson then described a meeting between Mr. Wygal and the elders, but could not remember if Mrs. Wygal was present. However, Sanderson affirmatively testified that neither Wolfe nor the Wygals' son was present at the first meeting between Mr. Wygal and the elders. The elders then scheduled a second meeting with Wolfe, and that meeting ended when "Homer was reprimanded rather severely and instructed to not continue in any form of the activities that he had been in; there were to be *no* visits with anyone for the purpose of giving them any form of counseling." (Emphasis in testimony.) Sanderson did not describe any other meetings addressing the Wygals' concerns with Wolfe's counseling methods.

Wolfe's employment in early June of 1988, ostensibly due to the ineffectiveness of the Family Life Ministry and not primarily due to any allegations raised by Wolfe's counselees, because, as one elder testified, "those were allegations, and we had no concrete proof that they took place and that any type of abuse – poor judgment, yes, but any type of abuse had taken place that we could identify."

In a letter to the elders on June 4, 1988, Wolfe requested an extra month of compensation to support his job hunting efforts since he would be busy "keeping counseling appointments" during his last week on the job. The DeBose child could not remember seeing Wolfe in counseling in 1987 or 1988 specifically. However, Wolfe's own calendar shows counseling appointments with the child in January, February, March, April, and May of 1988.

DeBose and her child filed suit against Wolfe and Bear Valley in Denver District Court in 1991. After trial, a jury returned a verdict for DeBose and against Bear Valley for breach of fiduciary duty and vicarious liability. The jury returned a verdict for DeBose's child and against Bear Valley for breach of fiduciary duty, outrageous conduct, negligent hiring and supervision, and vicarious liability. The jury returned a verdict for DeBose and against Wolfe for breach of fiduciary duty. Finally, the jury returned a verdict for DeBose's child and against Wolfe for breach of fiduciary duty and outrageous conduct. On November 10, 1992, the trial court entered an amended

judgment in favor of the DeBoses, including compensatory damages, exemplary damages, and interest.[8]

On appeal, the Colorado Court of Appeals, with one of the three panel members specially concurring and one dissenting, reversed the judgment and remanded the case for a new trial. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 218, 231 (Colo. App. 1994). The court of appeals held that (1) Wolfe was entitled to a jury instruction reflecting his theory that his counseling activities were protected by the First Amendment, *id.* at 221-222, (2) the trial court erred in permitting expert witnesses to testify regarding a professional standard for pastoral counseling, *id.* at 224-28, and (3) the jury awards were either inconsistent or duplicative, *id.* at 222-24. We then granted certiorari to review the case.[9]

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[8] The judgment, as amended, awarded Denise DeBose $11,487.73 against Wolfe and $30,502.39 against Bear Valley. Wolfe was jointly and severally liable for $9,168.73 of DeBose's award against Bear Valley. The DeBose child was awarded $157,835.76 against Wolfe and $458,098.07 against Bear Valley. Wolfe was jointly and severally liable for $75,516.68 of the DeBose child's award against Bear Valley.

[9] We granted certiorari on the following issues, as reframed by the court:

1. Whether the First Amendment provides a defense to tort claims if the alleged tortious conduct is motivated by a sincerely held religious belief.
2. Whether the court of appeals erred in holding that expert testimony regarding conduct appropriate in counseling a minor was admitted in error.

II. First Amendment Issues

A. First Amendment Defense of Homer Wolfe

1.

In *Destefano v. Grabrian,* we held that when a defendant raises the Free Exercise Clause of the First Amendment as a defense, "the threshold question is whether the conduct of the defendant is religious." 763 P.2d 275, 283 (Colo. 1988) (citing *Wisconsin v. Yoder,* 406 U.S. 205, 215-16 (1972); Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?,* 84 Mich. L. Rev. 1269, 1302 (1986)). *Destefano* involved a Catholic priest who engaged in an adulterous relationship with a woman to whom the priest was providing marital counseling. 763 P.2d at 279. The woman and her husband asserted tort claims against the priest and his diocese. *Id.* at 277-79. We recognized that the Catholic Church requires its priests to take a vow of celibacy, a principle the defendants acknowledged in their brief by agreeing that "sexual activity by a priest is fundamentally antithetical to Catholic doctrine." *Id.* at 284. Noting that the defendants did not claim that the priest was motivated by a sincerely held religious belief to engage in an adulterous relationship with his counselee, we concluded that "[w]hen the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of

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3. Whether the court of appeals departed from accepted precedent in reversing verdicts where the defendants did not object to the instructions or verdict forms at trial and on appeal.

4. Whether the court of appeals erred in reversing the jury verdicts based on their form.

his religion, he cannot avail himself of the protection afforded by the first amendment." *Id.* We foresaw, however, that "[i]f the alleged conduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue." *Id.*

In *Destefano*, we reversed the summary judgment against the plaintiff on her breach of fiduciary duty claim after determining that neither the priest nor the diocese had argued that the priest's adulterous relationship with the counselee plaintiff was motivated by a sincerely held religious belief. *Id.* at 284. Similarly, we must determine as a threshold matter whether Wolfe or Bear Valley asserted a sincere religious basis for Wolfe's use of therapeutic massage with counselees.

2.

The court of appeals concluded that Wolfe summarized his massaging of counselees as "a technique based upon his desire to facilitate communication with God." *DeBose*, 890 P.2d at 221. "Given this testimony," the court determined that the trial court should have provided the jury with the following instruction:

> [T]he jurors should be instructed [on retrial] that, if Wolfe touched the minor only in the manner in which he described touching other counselees, that such touching was engaged in solely in a sincere effort to facilitate the minor's communication with God, and that Wolfe was not motivated by any personal desires, then the jury must conclude that Wolfe did not violate any fiduciary duty owed to the minor or to his

> mother nor did he engage in any outrageous conduct toward either of them.

Id. at 221-22. The court reached this holding even though the instruction Wolfe tendered at trial simply relied upon the First Amendment as a "complete defense." *Id.* at 222. The court held that the offer of the instruction "was sufficient to require the trial court to fashion a proper instruction on the subject." *Id.* (citing *Lee v. Great Empire Broadcasting, Inc.*, 794 P.2d 1032 (Colo. App. 1989)). We disagree that the trial court erred in failing to instruct the jury in the manner prescribed by the court of appeals.

Based on our review of the testimony and other evidence presented at trial, we agree with the dissent to the court of appeals' opinion that "Wolfe posited no religious basis for his massage technique." *Id.* at 236 (Davidson, J., dissenting).[10] Wolfe testified as to why he used massage techniques on counselees. He began by generally addressing "the subject of touching among human beings:"

> I believe that it is one of the best ways to communicate – of communicating your care and concern for the other person. We have been created in the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody – say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're

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[10] We reject Wolfe's assertion that our grant of certiorari accepted as true that Wolfe had a sincere religious basis for the use of massage techniques with young counselees.

important, you're somebody, you have value, and that's something everybody needs.

Wolfe explained that the purpose of massaging a counselee "is to increase the value and the ability to communicate, both to hear and to share." Under questioning from his own counsel, Wolfe then explained why he began to massage counselees:

Q. Did you sometimes – well, I think I already established you sometimes did use massage in connection with counseling. When did you start using that practice? How did it come to your attention that it could be useful?

A. I guess it would be as my own two sons were growing up in their preadolescent and adolescent years, that they had normal problems at that age, unable to communicate and perhaps not being able to as well as they would like; and massaging their backs and legs in order to relax them, it helped a great deal in our communication. We became very close, and we're still very close today. They grew up to be fine Christian young men.

Q. Now, when you – after that experience in your own family, when – how did it come about that you began to use it occasionally in connection with counseling?

A. How did it come about?

Q. That you began to use it sometimes in counseling people?

A. Oh. Well, I find that people, were uptight and a little bit fearful of what is going on. People are, at first, in counseling somewhat

> fearful. It helps to relax them and helps them to communicate.
>
> Q. In other words, if a person in counseling seems to be having trouble telling you what's wrong or going about what's needed in order to help themselves and have you help them, you have found that on some occasions massage will cause them to relax and communicate better?
>
> A. Yes, sir, that's correct.

Wolfe also described massaging another young counselee and maintained that "the whole purpose of it was for the purpose of concentrating on communication." Similarly, Wolfe testified that he "probably" suggested to an additional young counselee that he remove his pants "because through denim jeans and hard fabrics you don't get contact, and the whole thing here is – the purpose of [massage] is to assist in communication."

Evidenced by the testimony presented at trial, Wolfe never asserted a religious belief for his utilization of massage techniques with counselees.[11] As noted in the dissent to the court of appeals' decision:

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[11] Wolfe's attorney, in the course of opening statements, explained Wolfe's use of therapeutic massage techniques in counseling in terms of wholly secular reasons:

> And Homer [Wolfe] did learn in his counseling that sometimes if a person was having trouble communicating with him, he couldn't break through the inhibitions or impediments to be able to communicate or receive communications from the counselee, he also found that hugging or massaging would sometimes be of assistance in helping people to relax and communicate. In fact, I think Homer's

According to the record, even though he claimed that he could not remember using massage on the minor plaintiff, Wolfe explained that he used massage to assist his counselees in communicating their problems to him so he could help them. Since he believed human touch to be one of the best methods of communication between people, he chose this type of massage to help counselees relax and, consequently, communicate more freely *with him.*

Thus, although his ultimate goal in spiritual counseling was for counselees to receive help from God in resolving their problems, by Wolfe's own testimony, his choice to use massage with children had no biblical, doctrinal, or spiritual basis, justification, or underpinning. Despite the religious setting, the described massage technique simply reflects Wolfe's choice of

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testimony will be that he had first discovered the success of massaging as a means of helping people to communicate when his own sons were growing up, and at times, as all adolescents or preadolescents do, go through a period of time when they may feel rebellious or dissatisfied with the acceptance of authority. And there would be times when his sons were not able to respond to efforts to discuss things and bring them out into the open, and he found that if he would massage them, it helped them to relax, and then they were able to communicate in many things that might have otherwise become problems that we hear about so much of teenagers, who not only become rebellious but would act on their rebellion. Those circumstances were averted in Homer's family, and he had a very happy married life, and his sons were happy and grew up to be happy men, who now have happy families of their own, because Homer had the wisdom to help them to communicate.

> a relaxation and communication method between himself and his counselees.

Id. at 236 (Davidson, J., dissenting) (emphasis in original).[12] We agree with those observations and conclusions.

B. First Amendment Defense of Bear Valley

Regardless of any alleged religious basis for Wolfe's decision to treat young counselees with therapeutic massage, Bear Valley contends that it is entitled to First Amendment protection for its actions in hiring, supervising, disciplining and ultimately discharging Wolfe. We disagree, as did the court of appeals. *See DeBose*, 890 P.2d

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[12] In view of our determination that Wolfe never asserted a religious belief for his utilization of massage techniques with young counselees, we will not address several arguments of the parties, including whether (1) Wolfe engaged in religious "conduct" or "belief," *compare DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 220 (Colo. App. 1994) *with DeBose*, 890 P.2d at 236-38 (Davidson, J., dissenting), and any resulting implications; (2) the trial court was obligated to provide the jury with a First Amendment instruction that was not tendered by the defendants; (3) the torts of breach of fiduciary duty and outrageous conduct are religion-neutral laws according to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 876-82 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540-42 (1993), and any resulting implications; and (4) the compelling state interest test required by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1993), is constitutional and supersedes *Smith*, and if so, whether we could apply RFRA to this case retroactively, *but see Van Osdol v. Vogt*, 908 P.2d 1122, 1130 n.12 (Colo. 1996) (RFRA inapplicable to events preceding its passage).

at 221. In *Van Osdol v. Vogt*, 908 P.2d 1122, 1128 (Colo. 1996), we held that "[t]he decision to hire or discharge a minister is itself inextricable from religious doctrine." However, we took care to distinguish internal hiring disputes within religious organizations from general negligence claims filed by injured third parties:

> While Claims for illegal hiring or discharge of a minister inevitably involve religious doctrine, that is not the case for a claim of negligent hiring of a minister. The claim of negligent hiring is brought after an employee has harmed a third party through his or her office of employment. An employer is found liable for negligent hiring if, at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others. *Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316, 1321 (Colo. 1992); Restatement (Second) of Agency § 213 cmt. d (1958). Hence, the court does not inquire into the employer's broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs. *See Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (holding that although courts must not become embroiled in interpreting or weighing church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of religious belief but

> instead is merely application of a secular standard to secular conduct), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).

Van Osdol, 908 P.2d at 1132-33 n.17. As we noted in *Van Osdol, id.*, courts may review an injured third party's claim that a religious institution negligently hired, supervised, or failed to discharge one of its employees without implicating or running afoul of the First Amendment. *See, e.g., Moses*, 863 P.2d at 321, 329-31 ("Tenantry's Claims in this case do not involve disputes within the church. . . . ").

III. Expert Testimony Issues

The court of appeals held that the trial court erred in admitting certain expert testimony, and concluded that the admission of such testimony constituted prejudicial error. *DeBose*, 890 P.2d at 224, 228. The court determined that the tendered expert testimony was prejudicial for three reasons. *Id.* at 227-28. First, the court held that a portion of the testimony was irrelevant. *Id.* at 227. "[T]here was no evidence that Wolfe asked the minor to compare his genitals to photographs in any book. . . . At best, it related to incidents allegedly occurring during sessions with other counselees." *Id.* Second, the court determined that some of the testimony presented the jury with an inquiry prohibited by the First Amendment, i.e., "whether Wolfe's techniques were, in fact, valid from a Biblical standpoint." *Id.* Third, the court held that some of the testimony provided the jurors with professional standards for both secular and pastoral therapeutic counseling. *Id.* The court concluded that a secular standard was irrelevant in the pastoral counseling context, and that a pastoral standard impermissibly allowed the jurors to

render a decision based on "clergy malpractice." *Id.* The court also noted that the prejudicial impact of the expert testimony was "exacerbated" by the trial court's failure to instruct the jury that Wolfe might be insulated from liability pursuant to the First Amendment. *Id.* We do not agree that the trial court erred in admitting the expert testimony, and will address each of the court of appeals' concerns in turn.[13]

A.

First, the court of appeals incorrectly concluded that the expert testimony concerning Wolfe's alleged examination of a young counselee's genitals was "irrelevant." *Id.* at 227. The testimony at issue focused on the accusations of the Wygals' son. The appropriateness of the therapy techniques Wolfe used on the Wygals' son directly related to questions of (1) whether Bear Valley was on notice of alleged improprieties in Wolfe's practice but continued to allow Wolfe to see other counselees, including the DeBose child, and (2) whether Bear Valley could have prevented reasonably foreseeable harm to DeBose. *See Destefano*, 763 P.2d at 288 ("a person who knows or should have known that an employee's conduct would subject third parties to an unreasonable risk of harm may be directly liable to

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[13] In view of our resolution of this issue, we will not address the impact that the defendants' legal strategy otherwise might have on our analysis. In his disclosure certificate, Wolfe affirmatively placed the plaintiffs on notice that "[d]efendant Wolfe may call one or more experts to testify about the appropriateness of his counseling practices." Furthermore, Bear Valley's attorney specifically asked one of the witnesses in question about "standards" for "pastoral counselors."

third parties for harm proximately caused by his conduct") (footnote omitted). The DeBoses' attorney offered the expert in part as one qualified to render opinions on "responsibility of supervision in church settings and avoiding reasonable foreseeable injury." The trial court took care to preface the introduction of this testimony with extensive and repeated cautionary instructions, limiting the evidentiary use of the testimony to the relevant issue of notice as it relates to prevention of reasonably foreseeable harm:

> [DeBoses' attorney, in sidebar discussion with court]: The testimony you're about to hear may be used for the purpose of showing notice
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> . . . .
>
> The Court: Okay. I'll make an instruction, but you can make further record if you need to.
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> Jurors, you have already heard some references to statements or testimony of two individuals, Mr. and Mrs. Gary Wygal, W-y-g-a-l, and this witness is about to refer to statements that they allegedly made involving themselves or their children, as the case may be. This is one of those situations where evidence can be admitted for one purpose, but not for another purpose, and is an appropriate time for me to caution you about this particular type of testimony. I mentioned this yesterday as a possibility.
>
> We have two defendants in this case. We have Homer Wolfe, and we have the Bear Valley Church of Christ. There may be a time when evidence would be allowed as against one of the Defendants, but not the other Defendant. There may be a time when the evidence is allowed as

against both Defendants, but only for a specific purpose.

The Defendants dispute these so-called – using [Wolfe's counsel's] language – other acts that are alleged to have occurred or taken place by Homer Wolfe. Other acts meaning, other reportedly improper acts, which are of a nature – a similar nature as what Plaintiffs in this case assert happened. We are not here to determine whether these other acts, in fact, occurred or not. They are disputed. That is not what this case is about.

I am permitting this testimony with respect to what the Wygals informed the church about – or at least about their concerns, for the limited purpose of allowing Plaintiff to present evidence, and whether you accept or reject it is your choice, but allow the Plaintiff to present evidence that the church was aware of possible problems involving Homer Wolfe's counseling. So it is being admitted for the purpose of what the church knew and when.

It's what we call – we lawyers call a notice issue. The fact that there's testimony that these things occurred does not mean that they did, in fact, occur, because that is essentially hearsay. We don't have, for instance, I think, the son coming into court to say what did or did not happen to him. So it's important that you understand the fine evidentiary line that we are drawing here.

. . . .

. . . Again, jurors, I want to emphasize that these allegations are not being presented to you for the truth of the matter asserted. It is simply

information which was available to the church and it goes to the issue of notice, which you'll hear more about in the instructions. It is disputed whether these actions actually occurred regarding the Wygal child or children.

. . . .

[DeBoses' attorney]: Could you explain to the jury, without using any names, with the exception of Mr. Wolfe's name, how he applied [a book entitled "The Gift of Sex"] to therapy?

[Wolfe's attorney]: I object. I object on the grounds that it has to apply to [the DeBose child] or Denise DeBose in order to have any relevance to this case.

[DeBoses' attorney]: Your Honor, we're talking about the reasonableness or unreasonableness of his counseling and whether or not the Elders should have known. Your Honor, if you'll allow me to make a little bit more of a foundation.

[The Court initially sustained the objection but, after additional foundation evidence and argument, permitted Debose's attorney to proceed.]

[Mr. Schoener]: Could you restate your question? I'm sorry.

[DeBoses' attorney]: Is there anything about the way that Homer Wolfe used *The Gift of Sex* in therapy that was dangerous?

[Mr. Schoener]: Yes.

[DeBoses' attorney]: Describe that to the jury.

> [Mr. Schoener]: The notion of having people compare their genitals to those in the book to see if they've been properly circumcised, I think, is not something that's legitimate counseling or likely to be helpful. It's quite likely to be confusing and harmful, particularly in the pastoral counseling context.

The trial court took the additional step of instructing the jurors in writing at the conclusion of the case that "[e]vidence from or regarding [the Wygals' son] . . . may be considered only as evidence for the purpose of showing notice to the Church, but you should not consider it as evidence for any other purpose." Jury Instruction No. 12.

We hold that the court of appeals erred in determining that the expert witness testimony was "irrelevant" and "prejudicial" in applicable part. *DeBose*, 890 P.2d at 224-28. The notice and foreseeability issues directly related to the DeBoses' theories of the case, embodied in the court's instructions to the jury regarding the DeBoses' claim of negligent hiring or supervision:

> Negligence as to negligent hiring or supervision means a failure to do an act which a reasonably careful Church employer would do, or the doing of an act which a reasonably careful Church employer would not do, under the same or similar circumstances, to protect others from harm.
>
> . . . .
>
> The negligence, if any, of the defendant Bear Valley is not a cause of any injuries to either plaintiff, unless injury to a person in the plaintiff's situation was a reasonably foreseeable consequence of that negligence. The exact precise

> injury need not have been foreseeable, but it is sufficient if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct.

Jury Instructions Nos. 18, 23. We conclude that the expert testimony concerning the Wygals' accusations was relevant and properly admitted on the question of whether Bear Valley had the requisite notice to prevent reasonably foreseeable harm to the DeBose child.[14]

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[14] Indeed, Bear Valley highlights in a brief the limited purpose, i.e., notice and foreseeability, that this testimony served in summarizing the testimony under a heading entitled "The Setting of Secular Standards for Pastoral Counseling of Minors is Barred by the First Amendment:"

> The trial court permitted the DeBoses to put on the following evidence involving the church's clergy handling activity by the Elders:
>
> Wolfe was hired by the church without adequate investigation; Wolfe was not qualified to counsel; Wolfe's methods were improper; Wolfe was not equipped to counsel emotional matters; Wolfe improperly touched people; Wolfe required a qualified supervisor; no one at the church was qualified to supervise Wolfe; the Elders' supervision resulted in harm by Wolfe; the Elders acted improperly in processing the Wygal complaint; the Elders did not investigate the Wygal complaint properly; the Elders improperly defined Wolfe's job duties; the church improperly defined the counseling service of Wolfe; the church failed to inform the congregation of Wygals' complaint; and the church failed to properly advise the congregation upon terminating Wolfe.

Answer/Reply Brief of Bear Valley at 27-28, *Bear Valley v. DeBose*, (Jan. 26, 1996) (No. 95SC42) (citations to record omitted).

B.

Second, the court of appeals incorrectly determined that some of the testimony presented the jury with an inquiry prohibited by the First Amendment. *DeBose*, 890 P.2d at 227. The court of appeals held:

> [S]ome of this testimony called into question the validity of Wolfe's beliefs concerning the efficacy of touching, which he claimed to be grounded in his religious principles. To the extent that such testimony was intended to present a jury question as to whether Wolfe's techniques were, in fact, valid from a Biblical standpoint, the First amendment prohibited its consideration for this purpose.

Id. (citation omitted). The court of appeals premised its criticism on the conclusion that Wolfe claimed a religious basis for his use of therapeutic massage with young counselees. *Id.* However, as previously noted, *supra* part II(A)(2), Wolfe never presented the jury with a religious basis for his use of massage techniques with counselees but rather explained his use of massage in terms of secular rationale. We disagree with the court of appeals because the jury never had to consider whether Wolfe's beliefs concerning the efficacy of touching were grounded in his religious principles. *See DeBose*, 890 P.2d at 227.

C.

Third, the court of appeals incorrectly held that some of the testimony provided the jurors with professional

standards for both secular and pastoral therapeutic counseling, in effect subjecting Wolfe to a claim for clergy malpractice. *Id.* The court explained:

> [T]his testimony sought to establish a professional standard for *pastoral* counseling, *i.e.*, that a minor counselee should never be touched by any counselor. And, unless the proffering of such testimony was intended to allow the jurors to determine that Wolfe violated this professional standard, it was irrelevant to any issue that they were to decide. But, to allow the jurors to assess liability against Wolfe for violating this standard was tantamount to imposing liability for "malpractice," *i.e.*, for the violation of a professional standard of conduct.

DeBose, 890 P.2d at 227. The court then noted that the trial court "exacerbated" the prejudicial impact of the expert testimony by failing to instruct the jury that the First Amendment might insulate Wolfe from liability. *Id.* Again, we disagree.

The testimony concerning Wolfe's use of therapeutic massage with young counselees was not directed toward establishing an impermissible claim for clergy malpractice. *See Moses*, 863 P.2d at 321 n.13 ("In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not.") (citation omitted). Instead, the testimony potentially supported the DeBoses' claim that Bear Valley should have been aware that Wolfe was utilizing counseling techniques with young boys that did not conform with Bear Valley's own counseling expectations. According to one of the plaintiffs' theories of the case, if Bear

Valley had notice that Wolfe employed counseling techniques with the Wygal youth that were allegedly inappropriate, the Bear Valley elders could have prevented any harm that the DeBose child experienced subsequent to the initial complaint by the Wygals. *See supra* part III(A). The trial court appropriately allowed expert testimony relating to the propriety of Wolfe's therapeutic massage technique for this limited purpose.[15]

The court of appeals also erred in analyzing the testimony of another expert witness, Reverend Marie Fortune, with regard to the incident concerning the Wygals' son. The court of appeals characterized the testimony as evidence impermissibly directed toward a professional standard of care for pastoral counselors:

> [O]ver objection, this witness was also allowed to testify that "nudity or partial nudity" is "inappropriate in the pastoral relationship." This witness said that, while such might be appropriate in either a "medical setting" or in a "situation with a licensed massage therapist," such activity is "unnecessary" and "inappropriate" in either a therapeutic or a pastoral relationship.

DeBose, 890 P.2d at 226. In fact, the relevant testimony was directly applicable to the questions of notice and

---

[15] In any case, we do not believe that the alleged error was "exacerbated" in any way by the trial court's refusal to provide the jury with an instruction regarding Wolfe's First Amendment defense. Neither Wolfe nor Bear Valley contended that the counseling techniques to which the DeBoses objected were grounded in religious belief. *See supra* part II(A)(2).

reasonably foreseeable harm. The relevant testimony reads:

> [DeBoses' attorney]: Do you have an opinion within a reasonable degree of certainty as to whether or not the Bear Valley Church of Christ failed in its supervision of Homer Wolfe in preventing reasonable foreseeable harm?
>
> [Reverend Fortune]: Yes. I think that was inadequate.
>
> [DeBoses' attorney]: Explain to the jury in what way they failed?
>
> [Reverend Fortune]: As best I can. I could tell, again, from the depositions there was no supervision of Mr. Wolfe by anyone qualified to supervise the work that he was doing. There seemed to be confusion about the nature of the work that he was doing and some concern expressed by the Elders as to whether he was overstepping his – the bounds of his job. But it seemed to me that that concern was not pursued in terms of – particularly the allegations – but it was not pursued in any way that was effectively supervising him regarding that.
>
> My other concern that has to do with both the hiring and supervision and the lack of qualifications for the job that he was asked to do. As I recall, the only reference to qualifications had to do with the fact that he had been a preacher for a number of years and that he was a former director of education at the churches he served previously. In my opinion, neither of these things qualified him for the position that he was being asked to serve in. So that, combined with lack of oversight and supervision, seemed to me inadequate.

[DeBoses' attorney]: When the allegations of [the Wygals' son] were brought to the Elders in either May or June of 1987, what should they have done?

[Reverend Fortune]: In my opinion, they should have investigated further beyond those allegations. It would have been advisable, it seems to me, for them to have suspended Mr. Wolfe's counseling work that he was doing until an investigation could have been completed, so that there would not have been any chance for further access to persons who might possibly have been harmed.

. . . .

[DeBoses' attorney]: . . . Reverend Fortune, where a minister admits to employing nudity and partial nudity in the counseling setting, is injury to the counselee reasonably foreseeable?

[Reverend Fortune]: It seems to me that it is, because that is inappropriate in the pastoral relationship.

[DeBoses' attorney]: Why is that?

[Wolfe's attorney]: Your honor, I object to the testimony about the standard of care in the pastoral relationship on the same grounds.

[DeBoses' attorney]: Your honor –

The Court: Objection overruled.

[DeBoses' attorney]: Why is that inappropriate?

[Reverend Fortune]: In my opinion there are two situations, it seems to me, in which

> disrobing is appropriate, and there may be others, but it seems to me, two. In particular, in a helping relationship where we are seeking out a professional to assist us with a particular problem. One would be a medical setting, and the other would be a situation with a licensed massage therapist.
>
> [DeBoses' attorney]: Beyond that, in any counseling – therapeutic, pastoral – relationship, disrobing is inappropriate?
>
> [Reverend Fortune]: It's unnecessary and it's inappropriate.

The plaintiffs specifically presented this witness "as an expert in theology *relative* to procedures and practices reasonably necessary in a church setting to prevent foreseeable harm." (Emphasis added.) *But cf. DeBose*, 890 P.2d at 225 (incorrectly stating that expert "was tendered as an 'expert in theology' *and* upon 'procedures and practices in church settings necessary to prevent reasonably foreseeable harm.' ") (emphasis added). Again, neither Wolfe nor Bear Valley contended that the use of nudity as a counseling technique had roots in religious belief. We do not view Reverend Fortune's testimony as directed toward a standard of care for pastoral counselors. Rather, it was properly received as relevant to notice and reasonably foreseeable harm.

IV. Inconsistent or Duplicative Jury Awards

Finally, Wolfe and Bear Valley contend that the jury verdicts were either inconsistent or duplicative. In reviewing this claim, the court of appeals acknowledged that "[t]he record here does not contain a transcript of

any discussion with respect to the instructions or verdict forms. Hence, it does not reflect any objection interposed by defendants to the verdict forms." *DeBose*, 890 P.2d at 223. Nevertheless, the court of appeals addressed the defendants' claims for the following reason:

> However, after the verdicts were received, defendants sought to have them set aside, claiming that they resulted in the award of duplicate damages. Plaintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented them from raising this issue, and the trial court addressed the merits of defendants' assertion. We shall do likewise. . . .

Id. We disagree with the court of appeals' analysis of the record, *id.*, and conclude that the defendants did not preserve their contention adequately for appellate review.

We agree with the court of appeals that the record does not contain any evidence that the defendants entered objections to the verdict forms or instructions, prior to submission to the jury, on the basis that the instructions allowed the jury to assess inconsistent or duplicative damages. *Id.* Our review of the record indicates that the defendants raised the issue of duplicative or inconsistent verdicts for the first time in the course of post-verdict motions. However, the DeBoses responded to the defendants' post-trial contention by asserting that the defendants never raised the issue at trial, and the trial court summarily rejected the defendants' claim of inconsistent and duplicative damages in part because of the DeBoses' assertion that the defendants did not adequately preserve the issue.

In a memorandum in support of its post-trial motions,[16] Bear Valley asserted that the jury verdict forms resulted in conflicting and duplicative verdicts. Bear Valley did not assert in the memorandum that either defendant objected to the jury instructions or verdict forms prior to submission to the jury. Similarly, Wolfe filed a post-trial motion for an amendment of the judgment, claiming that the jury verdicts were duplicative. Again, Wolfe did not contend that either defendant objected to the verdict forms or instructions prior to judgment, even though his post-trial motion contained an entire section devoted to a motion for new trial based on "Defendant Wolfe's Tendered and Refused Jury Instructions." Defendant Wolfe's Post-Trial Motions at 18-19, 31-34, *DeBose v. Wolfe*, (Denver District Court, Sept. 10, 1992) (No. 91CV4346).

The defendants never argued in the district court that they objected to the verdict forms and instructions on the basis that they were inconsistent or duplicative prior to submission to the jury, and the court of appeals correctly concluded that the record does not contain any evidence of such objections. *DeBose*, 890 P.2d at 223. However, the court of appeals misconstrued the procedural history of the case in determining that "[p]laintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented

---

[16] Bear Valley filed a post-trial motion seeking, either in conjunction or in the alternative, a new trial, judgment notwithstanding the verdict, amendment of the judgment, and remittitur. In its post-trial motion, Bear Valley also adopted all of the claims that Wolfe asserted in his own post-trial motion.

them from raising this issue, and the trial court addressed the merits of defendants' assertion." *Id.* Indeed, the DeBoses responded to Bear Valley's post-trial assertion that the jury instructions and forms resulted in duplicative or inconsistent verdicts by arguing, in relevant part:

> [Bear Valley] did not argue that the verdict forms were insufficient prior to tendering them to the jury. In fact, [Bear Valley] asserted a position which required that simple verdict forms originally tendered by [the DeBoses] be revised into multiple forms with multiple sets of damage figures. [Bear Valley] then agreed to the forms as revised.

Plaintiff DeBoses' Response to Defendant Bear Valley Church of Christ's Motion for New Trial, and/or Judgment Notwithstanding the Verdict and/or Amendment of Judgment and/or for Remittitur at 8, *DeBose v. Wolfe*, (Denver District Court, Sept. 15, 1992) (No. 91CV4346) (parenthetical reference to attached exhibits omitted). The DeBoses incorporated this argument into their response to Wolfe's post-trial assertion that the verdicts were duplicative or inconsistent. The trial court, having presided over the trial and having heard any objections by counsel to the jury verdict forms and instructions, agreed with the DeBoses' response to Wolfe's post-trial argument that the verdict forms allowed for duplicative or inconsistent verdicts, and refused to address Wolfe's substantive contention in summarily denying Wolfe's post-trial motions:

> Defendant Wolfe's Post-Trial Motions are denied for the reasons previously articulated by the Court during the trial of the within action, as well as for the reasons articulated by [the

DeBoses] in their Response to Defendant Wolfe's Post-Trial Motions.

In short, contrary to the court of appeals' conclusions, the DeBoses *did* argue "that defendants' failure to object [prior to judgment] to the form of the verdicts prevented them from raising this issue," *see DeBose*, 890 P.2d at 223, and the trial court accepted that argument in denying the defendants' post-trial motions.[17]

Based on the foregoing procedural history, culled from the record before this court, we conclude that the defendants did not preserve any objections to the jury verdict instructions or forms for the purposes of appellate review. According to our rules of civil procedure, a party cannot seek appellate review of the propriety of a jury instruction unless counsel tenders such an objection prior to the court's presentation of the instructions to the jury:

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[17] The court of appeals also erred in concluding that the "[p]laintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented them from raising this issue," because the plaintiffs did raise this objection in their briefs to the court of appeals. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 223 (Colo. App. 1994). In two separate documents filed with the court of appeals prior to its decision, the plaintiffs responded to the defendants' duplicative damages claim by arguing that "[n]one of the instructions concerning damages or the verdict forms were objected to by either Defendant." [Plaintiff DeBoses] Answer Brief to Defendant-Appellant Homer Wolfe at 37, *DeBose v. Wolfe*, (Colorado Court of Appeals, June 4, 1993) (No. 92CA001929); [Plaintiff DeBoses'] Answer Brief to Defendant-Appellant Bear Valley and Opening Brief on Cross Appeal at 44, *DeBose v. Wolfe*, (Colorado Court of Appeals, May 14, 1993) (No. 92CA001929).

> All instructions shall be submitted to the parties, who shall make *all* objections thereto *before* they are given to the jury. *Only the grounds so specified* shall be considered on motion for a new trial or on appeal or certiorari.

C.R.C.P. 51 (emphasis added). Relying on C.R.C.P. 51, we have stated that "[c]ounsel has the duty to examine the instructions, and his failure to detect errors and call the trial court's attention to them ordinarily operates as a waiver of the objection." *Scheer v. Cromwell*, 158 Colo. 427, 429, 407 P.2d 344, 345 (1965) (citing *Gilligan v. Blakesley*, 93 Colo. 370, 380, 26 P.2d 808, 812 (1933)); *accord, e.g., Blakesley*, 93 Colo. at 380, 26 P.2d at 812 ("[I]t is the duty of counsel to examine – or at least to listen to the reading of – the instructions at the time they are given; and, by not detecting errors promptly and not calling the trial court's attention thereto, so as to enable the appropriate correction to be made, the point must ordinarily be deemed waived."). As we noted in *Cromwell*, "[t]he 'contemporaneous objection' rule has a salutary purpose in the orderly administration of justice. Its principle is to enable trial judges to clarify or correct misleading or erroneous instructions before they are given to a jury, and thereby prevent costly retrials necessitated by obvious and prejudicial error." *Cromwell*, 158 Colo. at 429, 407 P.2d at 345 (citing *McDonald v. Jarka Corp.*, 144 F.2d 53 (2d Cir. 1944); *United States v. Monroe*, 164 F.2d 471 (2d Cir. 1947)).

We do not believe that this is one of the "rare" cases, where equitable concerns might warrant appellate review despite the lack of a contemporaneous objection to the jury instructions. *See Cromwell*, 158 Colo. at 429-30, 407 P.2d at 345. The trial court specifically cautioned the

jurors to avoid duplicative damages by the written jury instructions:

> The plaintiffs have sued for the same or similar injuries and losses on different claims for relief.
>
> . . . .
>
> If you find for a plaintiff on more than one claim for relief, you may award damages only once for the same injuries.

Jury Instruction No. 51A (as amended by the trial court in answer to a jury communication during deliberations). The verdict form for the DeBose child's negligence claim against Bear Valley also contained the admonition that the jury must "not include an award for damages for which [the DeBose child] has been compensated under any other theory." Similarly, the verdict form for the DeBose child's outrageous conduct claims against both Wolfe and Bear Valley contained two separate warnings that the jury could "not include damages which you have assessed under another theory of recovery." The jury also received like warnings under two claims that it rejected on statute of limitation grounds. As noted in the dissent to the court of appeals' opinion, "[t]he jury must be presumed to have understood and followed the court's instructions." *DeBose*, 890 P.2d at 239 (Davidson, J., dissenting) (citing *Schmutz v. Bolles*, 800 P.2d 1307, 1315 (Colo. 1990)); *accord, e.g., People v. Smith*, 620 P.2d 232, 239 (Colo. 1980); *James v. James*, 85 Colo. 154, 165, 274 P. 816, 820 (1929). The trial court recognized this proposition in granting the DeBoses' "Request for Entry of Judgment,"

when it again rejected the defendants' post-trial duplicative damages argument and held that "the jury was specifically instructed that it could not award duplicate damages, and it must be presumed the jury followed those instructions and determined damages accordingly." (Citing *Roberts v. C & M Ready Mix Concrete Co.*, 767 P.2d 769 (Colo. App. 1988); jury instruction citation omitted.) In view of these explicit jury instructions, we see no need to consider whether an equitable exception to the contemporaneous objection rule is warranted or even allowed under our rule of civil procedure that requires a party to enter any objections to jury instructions prior to the jury's receipt of those instructions. *See* C.R.C.P. 51.

V.

Aside from the aforementioned issues, the court of appeals concluded that the evidence was sufficient to sustain the jury verdicts. *DeBose*, 890 P.2d at 218, 221. For the foregoing reasons, we reverse the judgment of the court of appeals and remand with instructions to reinstate the judgment of the trial court, entered on the verdicts of the jury.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC42
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA1929
DISTRICT COURT, CITY AND COUNTY OF DENVER, 91CV4346

ORDER OF COURT

BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE, and J.D.B. a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

Upon consideration of the Petitions for Rehearing filed by Homer Wolfe and Bear Valley Church of Christ in the above cause, and now being sufficiently advised in the premises

IT IS ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC, JANUARY 13, 1997.

cc:

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Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX C

COLORADO COURT OF APPEALS
No. 92CA1929 November 17, 1994

Denise DeBose and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs-Appellees and Cross-Appellants,

v.

Bear Valley Church of Christ, a Colorado corporation,

Defendant-Appellant and Cross-Appellee,

and

Homer Wolfe,

Defendant-Appellant.

Appeal from the District Court of the City and County of Denver
Honorable Herbert L. Stern, III, Judge
No. 91CV4346

Division III
Opinion by JUDGE CRISWELL
Taubman, J., specially concurs
Davidson, J., dissents

JUDGMENTS REVERSED AND CAUSE REMANDED WITH DIRECTIONS

Opinion Modified, and As Modified,
Petitions for Rehearing *DENIED*
Davidson, J., would *GRANT* petition for
Plaintiffs-Appellees and Cross-Appellants

Holland, Seelen & Pagliuca, Joyce Seelen, Jeffrey S. Pagliuca, Denver, Colorado, for Plaintiffs-Appellees and Cross-Appellants

Quigley & Bruce, Neil Quigley, Denver, Colorado, for Defendant-Appellant and Cross-Appellee Bear Valley Church of Christ

Blunk, Johnson & Johnson, James D. Johnson, Sheila E. Barthel, Denver, Colorado, for Defendant-Appellant Homer Wolfe

The defendants, Homer Wolfe and Bear Valley Church of Christ (Church), appeal from judgments entered on jury verdicts in favor of plaintiffs, Denise DeBose (mother) and J.D.B. (minor), based on findings that both defendants breached a fiduciary duty owed to both plaintiffs and that they were guilty of outrageous conduct with respect to the minor. In addition, the Church was found liable to the minor because of its negligence in hiring and supervising Wolfe, a pastor employed by it. The minor cross-appeals, asserting that the court committed instructional error with respect to this claim of negligence. Although we conclude that the evidence was sufficient to sustain the judgments, we also conclude that the several verdicts upon which the judgment for the minor was based are either duplicative of the damages awarded him or are otherwise inconsistent. In addition, we conclude that the trial court erroneously admitted improper expert testimony and that it committed instructional error. Hence, we reverse and remand the cause for a new trial.

The jury's verdicts were based on incidents that allegedly occurred in pastoral counselling sessions conducted by Wolfe with the minor. Plaintiffs assert that these incidents involved the improper touching of the minor by Wolfe, constituting sexual abuse, which caused the minor and his mother severe emotional injury.

The minor testified that he counseled with Wolfe for several years prior to and immediately after entering middle school. He said that, commencing with the first counseling session, Wolfe would have the minor sit on his lap or sit next to him on a couch. Wolfe would then rub the minor's back and thigh. On occasions, Wolfe would slide the minor's shirt up while rubbing his back, and in several instances, Wolfe would rub the inside of the minor's thigh under his shorts next to his penis, which would be touched. While thus engaged, Wolfe would say to the minor that his father loved him, his mother loved him, God loved him, and Wolfe loved him.

Wolfe, on the other hand, denied having any physical contact with the minor in any of their counseling sessions. However, plaintiffs introduced evidence that in other instances involving other counselees Wolfe had employed massage as a counseling technique. Wolfe admitted doing so; he testified, nevertheless, that he limited his massaging to the back and the lower portions of the counselee's legs. He denied touching any counselee's thighs or genitalia.

Wolfe's testimony was that he never attempted to engage in any therapeutic or secular counseling. Rather, he described his counseling as "Biblical" or "Christian" in origin. He said that, over the years of his counseling, he carefully explained to his counselees that he had "no power to change" their lives, but that he could only "be a facilitator in order to help them get communication with God."

Wolfe also testified that, in order to aid counselees in this communication, he had found it necessary for him to

discover their problems; that many persons, particularly those in their pre-adolescent and adolescent years, were "unable to communicate and perhaps not being able to as well as they would like"; that he could not help a person to receive help from God without first finding out "what's wrong with them"; and that "massaging their backs and legs in order to relax them . . . helped a great deal in our communication."

He denied having any sexual motivation for his massaging activities.

Plaintiffs' claims against the Church were based upon evidence which, if credited, would support the finding that the elders of the Church were, during the time that the minor was in counseling with Wolfe, made aware of Wolfe's massaging techniques and alleged improprieties with other counselees, but they made no investigation and took no steps to put a stop to his activities.

The issues of liability submitted for jury determination, all of which were resolved in plaintiffs' favor, were:

– Whether Wolfe or the Church violated a fiduciary duty owed to either of the plaintiffs;

– Whether the actions of Wolfe or the Church constituted outrageous conduct;

– Whether the Church was negligent in its hiring or supervision of Wolfe;

– Whether the Church ratified Wolfe's action; and

– Whether the minor was comparatively negligent.

Although one was requested by the defendants, no instruction was given with respect to the significance of Wolfe's alleged sincere belief that massage facilitated a counselee's communication with God.

I.

We first reject the defendants' general assertion that, under the evidence presented here, any judgment against either of them would, in violation of the First Amendment, constitute an unlawful abridgement of their freedom of religion under the free exercise clause thereof or an improper intrusion into religious matters under its establishment clause, or both.

A.

In *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) our supreme court held that the free exercise clause of the First Amendment was not implicated by a civil action against a priest for damages suffered as a result of the priest's consensual sexual relationship with a parishioner, which commenced during the course of pastoral marriage counseling with both the parishioner and her husband. That conclusion, however, was based upon the admitted fact that the sexual activities of the priest were not "dictated by his sincerely held religious beliefs [and were not] consistent with the practice of his religion." Had such conduct been based upon such a belief or practice, the circumstances would have presented "a difficult first amendment issue." *Destefano v. Grabrian*, 763 P.2d at 284.

Here, however, Wolfe asserts that, unlike the priest's activities in *Destefano*, any touching of the minor that might have occurred was not designed to satisfy any of Wolfe's sexual desires, but was intended to facilitate the minor's communication with God. We must, therefore, consider the effect that such assertion has upon Wolfe's common law liability.

The First Amendment contains both a guarantee that persons shall have the right to exercise their "religion" freely and a prohibition that the government shall not establish any "religion." It has been made applicable to the states by the Fourteenth Amendment. *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Whether a person's beliefs are "religious" for purposes of the First Amendment, or are based simply upon moral or political values, is a question for the court. However, in construing the free exercise clause, the term "religion" has received an expansive interpretation. *See United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (for purpose of exemption from draft, a "religious" belief is simply the "ultimate," imperative, belief of an individual; belief in an external power not necessary). Thus, beliefs are "religious" for First Amendment purposes even if they are not acceptable, logical, consistent, or comprehensible. Only claims "so bizarre, so clearly nonreligious in motivation" should be denied free exercise protection. *Thomas v. Review Board*, 450 U.S. 707, 715, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624, 632 (1981). *See also* Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978).

Here, Wolfe's reliance upon the efficacy of massage as a means of enhancing communication with God may more accurately be described as a "practice," rather than as a "belief." Nevertheless, if his testimony is accepted, that this is a technique that he has found to be useful in furthering such communication, the practice has just as much a religious basis as would the practice of those who assume that a moment of silence facilitates such communication.

Further, if Wolfe's belief in such a practice is sincere, there need be, contrary to the views of the trial court, no necessity for further evidence to establish a "religious or Biblical justification" for the practice. On the contrary, if the belief or practice can be classified as religious, courts may not inquire into the validity of such belief or practice. *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); *Wolf v. Rose Hill Cemetery Ass'n*, 832 P.2d 1007 (Colo. App. 1991).

Nevertheless, belief is one thing, conduct another. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). And, there are instances in which courts have imposed civil liability upon pastors and churches for their conduct, even though such conduct was inspired by a religious belief. In other instances, the religious nature of the conduct has been deemed to provide a defense to a civil claim based on that conduct. *See Christofferson v. Church of Scientology, Inc.*, 57 Or. App. 203, 644 P.2d 577 (1982) (cited with approval in *Destefano v. Grabrian*, *supra*). *See generally* Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93

A.L.R. Fed. 754 (1989); Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 Mich. L. Rev. 1296 (1986).

Here, the jurors were not required to believe Wolfe's testimony concerning his motivation. And, the evidence was sufficient to allow a reasonable fact finder to infer that the minor was touched by Wolfe in an inappropriate manner for Wolfe's personal, rather than for any religious, purposes. Hence, if the jury's verdicts and resulting judgment were based upon the determination that the touching described by the minor was not religiously motivated, the free exercise clause of the First Amendment is simply not implicated by such a verdict. *Destefano v. Grabrian, supra.*

We conclude, therefore, that the nature of the evidence presented here was such that liability could be imposed upon Wolfe for his conduct without offense against the First Amendment's free exercise clause.

B.

The Church does not assert that it shared Wolfe's alleged beliefs concerning the religious efficacy of touching during counseling sessions. Hence, it does not assert a direct violation of *its* free exercise rights. Relying upon *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), however, both it and Wolfe argue that allowing civil judgments against pastoral counselors and their churches, based upon conduct occurring during counseling sessions, could so "entangle" the government with religious practices as to violate the establishment clause of the First Amendment.

This argument has been rejected by our supreme court in *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994), a decision rendered after the parties' briefs were filed in this court. There, our supreme court concluded that:

> Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution. The Supreme Court has not granted churches broad immunity against being sued in civil courts. Civil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record.

Moses v. Diocese of Colorado, supra, at 320-21 (citations omitted). *See also Bishop & Diocese v. Mote*, 716 P.2d 85 (Colo. 1986), *cert. denied*, 479 U.S. 826, 107 S.Ct. 102, 93 L.Ed.2d 52 (1986).

We consider *Moses* to be dispositive of the defendants' establishment clause assertions here.

II.

While we conclude that the evidence presented was sufficient to allow liability to be imposed upon both Wolfe and the Church without offending against any stricture imposed by the First Amendment, we also conclude that, because of the lack of an instruction upon Wolfe's alleged belief, the nature of the verdicts returned by the jury upon the minor's claims, and the receipt of

prejudicially improper expert testimony, the judgments for both the minor and the mother must be reversed.

A.

As a corollary to the argument that the evidence was such that the free exercise clause of the First Amendment barred the entry of judgment in plaintiffs' favor (which we have rejected), Wolfe also argues that, at the least, the trial court erred in refusing to give any instruction upon the significance of Wolfe's alleged sincerely held religious belief in the efficacy of massage. Given the testimony here, we agree.

While Wolfe denied touching the minor, plaintiffs, in an attempt to prove that he did engage in sexual conduct with him, introduced evidence that Wolfe massaged other counselees. Wolfe admitted engaging in some touching of other persons, but explained that such other touching was a technique based upon his desire to facilitate communication with God and did not involve any touching beyond the back and lower legs.

Given this testimony as to Wolfe's practices with other counselees, the jury could have determined that he engaged in the same practice with the minor. Further, the trial court recognized that, if the jury determined that any touching of the minor by Wolfe was "of a wholly innocent and incidental nature," defendants were entitled to a judgment. No instruction embodying this concept was given, however, and the lack of an instruction upon the subject was error.

Wolfe tendered an instruction that relied upon the First Amendment as a complete defense. Irrespective of whether that instruction was correct in form, the offering of it by Wolfe was sufficient to require the trial court to fashion a proper instruction on the subject. *See Lee v. Great Empire Broadcasting, Inc.*, 794 P.2d 1032 (Colo. App. 1989).

Hence, on retrial, if the evidence upon this subject is essentially the same as that presented previously, the jurors should be instructed that, if Wolfe touched the minor only in the manner in which he described touching other counselees, that such touching was engaged in solely in a sincere effort to facilitate the minor's communication with God, and that Wolfe was not motivated by any personal desires, then the jury must conclude that Wolfe did not violate any fiduciary duty owed to the minor or to his mother nor did he engage in any outrageous conduct toward either of them.

B.

As noted, the minor alleged that Wolfe violated a fiduciary duty owed to him and that Wolfe's actions constituted outrageous conduct. He also asserted that the Church was negligent in its hiring and supervision of Wolfe, that the Church had ratified Wolfe's actions after it became aware of them, and that the Church had, itself, violated a fiduciary duty owed to the minor, all of which constituted outrageous conduct by the Church.

However, the minor did not assert or present any evidence that he suffered *separate* injuries or damages

from each of the two claims asserted against Wolfe. Likewise, he made no assertion that any action of the Church caused him any injury or damage that was *separate from* or *in addition to* those caused by Wolfe. While he asserted that the Church independently violated a fiduciary duty by failing to investigate allegations against Wolfe, his claims against the Church were designed to require it to bear responsibility for the injuries caused the minor by Wolfe's actions. The various claims asserted by the minor, therefore, were simply alternative legal theories, based upon identical evidence, pursuant to which he sought recovery for the same injuries.

In its jury instructions, the court recognized and advised the jurors that all of the minor's claims were based on "the *same* or *similar* injuries and losses." (emphasis supplied) The jurors were also instructed that they should not assess damages under one theory of recovery that they had assessed under another theory. However, in separate instructions on each of the several claims, the jurors were advised that they could consider virtually the identical items of damages or injury with respect to each claim, and they were provided no instructional guidance as to the manner in which they were to divide the total damages suffered by the minor among the various claims asserted by him.

The jurors were required to *return* four verdicts and one special interrogatory with respect to the *six* claims asserted by the minor. They were provided with only a single verdict form with respect to the two claims (one against Wolfe and one against the Church) that alleged violations of a fiduciary duty. With respect to these two claims, the jurors were allowed to decide the relative

responsibility of both defendants based on their respective fault, and they were told that, with respect to these two claims, they were required to state a single amount of damages, but that they were required to apportion the total award between the two defendants.

In addition, the jurors were provided a separate verdict form for the claim based upon the Church's alleged negligent hiring and supervision of Wolfe, as well as two separate verdict forms for the two outrageous conduct claims. Finally, the jury was provided with a special interrogatory upon the question whether the Church had ratified Wolfe's actions.

Based on these instructions and verdict forms, the jurors awarded the following damages to the minor:

a. They awarded the total sum of *$156,228* in a single verdict on the two fiduciary violation claims, apportioning 66% of the fault therefor to the Church and 34% to Wolfe. The jury further found that the Church had ratified Wolfe's conduct and that the Church was, therefore, liable for Wolfe's 34% share, as well.

b. They found that the Church's negligent hiring and supervision caused the minor damage in the total amount of *$87,587*, but they also found that the minor was responsible for 4% of this damage.

c. They found that Wolfe's outrageous conduct caused the minor damage in the amount of *$23,397* and that the church's similar conduct caused *$28,764* in damage to him.

In addition, the jury awarded punitive damages in favor of the minor against Wolfe in the amount of *$50,500* and against the Church for *$80,625*.

The court then added together the amounts stated in each of these verdicts and entered a single judgment against each of the defendants for the total amounts reflected in these verdicts.

The record here does not contain a transcript of any discussion with respect to the instructions or verdict forms. Hence, it does not reflect any objection interposed by defendants to the verdict forms. However, after the verdicts were received, defendants sought to have them set aside, claiming that they resulted in the award of duplicate damages. Plaintiffs have not asserted, either in the trial court or here, that defendants' failure to object to the form of the verdicts prevented them from raising this issue, and the trial court addressed the merits of defendants' assertion. We shall do likewise, and we conclude that the verdicts cannot be sustained on the present record because they either constitute duplicate awards, as defendants urge, or they are inherently inconsistent.

If the jury award to the minor for the defendants' breach of fiduciary duty includes damages that the jury awarded him under the outrageous conduct claims, such awards would be improperly duplicative. *See Lexton-Ancira Real Estate Fund v. Heller,* 826 P.2d 819 (Colo. 1992); 1 D. Dobbs, *Law of Remedies* §3.3(7) (2d ed. 1993).

Even if we were to assume that the law authorizes a jury to apportion damages among tortfeasors, the jury was provided no criteria or bases upon which such an apportionment was to be made among these claims.

Hence, because the jury was authorized to award damages under each claim for the same items of injury or loss, there exists no basis upon which we can determine for what injuries any of these separate awards was intended to compensate.

Further, the separate awards based on the breach of fiduciary claims and the outrageous conduct claims are, in any case, facially inconsistent.

If Wolfe's actions combined with those of the Church to cause a single, indivisible injury, the two defendants would be considered to be joint tortfeasors. In the case of such a single injury, the damages suffered must be apportioned among the tortfeasors based upon "percentage of . . . *fault* attributable to each of the parties. . . . " Section 13-21-111.5(2), C.R.S. (1987 Repl. Vol. 6A) (emphasis supplied). And, the court's submission of only a single verdict form in apparent compliance with this statute with respect to the fiduciary violation claims would lead to the conclusion that that court determined that only a single injury was involved.

On the other hand, if the actions of Wolfe and the Church did not result in a single, indivisible injury, but instead resulted in separate, apportionable injuries, each would be fully liable only for the *injury* caused by his or its own actions; the liability would not, in that case, be based upon relative fault, but upon the nature of the injury that each caused. *See* §13-50.5-102(1), C.R.S. (1987 Repl. Vol. 6A) (joint tortfeasors are those who "become jointly or severally liable in tort for the *same* injury" (emphasis supplied)); *Miller v. Singer*, 131 Colo. 112, 279 P.2d 846 (1955); *Panther v. Raybestos-Manhattan, Inc.*, 701

P.2d 145 (Colo. App. 1985). Hence, the court's submission of separate verdict forms for the two outrageous conduct claims would necessarily mean that the court had concluded that separate injuries were sustained by the minor as a result of this conduct, even though it was the same conduct upon which the minor's fiduciary claims were based.

Wolfe and the Church, however, cannot be considered to be joint tortfeasors for one portion, but only several actors for another portion, of the damages sustained by the minor from the same indivisible injury. Hence, the submission of two types of verdict forms to the jury with respect to the breach of fiduciary duty and the outrageous conduct claims, one calling for apportioning damages for a *single* injury and the other requiring assessment for *separate* injuries, was error. Such submission resulted in verdicts that either duplicated damages or were based upon inconsistent findings with respect to the nature of the minor's injuries.

Likewise, it was improper to allow the jury to assess separate damages against the Church, based upon the claim that it negligently hired and supervised Wolfe.

The minor's negligence claim was based on the principle that an employer's negligence in hiring or supervising its employee renders it liable for the harm resulting from that employee's actions. *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (Colo. 1992). Therefore, such a negligent employer is liable *"only to the extent* that the harm is caused by the quality of the employee" hired. Restatement (Second) of Agency §213 comment d (1958) (emphasis supplied).

Here, then, the Church's negligence could have rendered it liable to the minor for the injuries caused by Wolfe, but that negligence did not result in any *additional* harm to him. Again, therefore, the separate damage award against the Church on this basis resulted in a verdict duplicative of the awards rendered against Wolfe.

The judgment entered in favor of the minor against Wolfe and the Church on all of these verdicts for actual damages must be reversed. And, because these actual damage awards must be set aside, the judgment for exemplary damages must also be reversed. Upon retrial, any verdict assessing the minor's actual damages should be limited to a single amount, apportioned under §13-21-111.5(2), unless the evidence would allow a determination that the minor suffered a separate injury from the actions of each of the two defendants.

C.

Defendants also assert that the trial court improperly allowed expert witnesses to express their opinions upon standards that should be applied in a pastoral counseling setting and that such testimony allowed the jury to base its verdict upon the concept of "clergy malpractice," which has been rejected by our supreme court. We agree that receipt of portions of the expert testimony constituted prejudicial error.

In *Destefano v. Grabrian, supra,* our supreme court first determined that, while the services performed by a therapeutic counselor and those provided through pastoral counseling often overlap, so long as the cleric providing

pastoral counseling is not held out as a therapeutic counselor, the standards of care applicable to therapeutic counseling cannot be applied to a pastoral counselor.

Second, with the *Destefano* opinion, the supreme court joined substantially all of the other courts that have passed upon the issue in rejecting the notion that a claim will lie against a pastoral counselor or the pastor's church based upon the pastor's failure to observe any particular standard of care in providing the counseling; no claim for "clergy malpractice" can be asserted. *See Schieffer v. Catholic Archdiocese,* 244 Neb. 715, 508 N.W.2d 907 (1993); *Bladen v. First Presbyterian Church,* 857 P.2d 789 (Okla. 1993); *Byrd v. Faber,* 57 Ohio St. 3d 56, 565 N.E.2d 584 (1991); *Strock v. Pressnell,* 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988); *Christofferson v. Church of Scientology, Inc., supra; Schmidt v. Bishop,* 779 F. Supp. 321 (S.D.N.Y. 1991); *Jones v. Trane,* 153 Misc. 2d 822, 591 N.Y.S.2d 927 (1992).

The judicial rejection of such a claim has been based, in large part, upon the effect that recognition of such a claim would have upon the right of religious expression guaranteed by the First Amendment.

In order to adjudicate a claim based upon the "malpractice" of a religious counselor, courts would first have to establish the degree of skill and learning normally exercised by members of the clergy in similar circumstances and, then, to determine whether such standard had been violated. *See Strock v. Pressnell, supra* (citing Restatement (Second) of Torts §299A (1965)). To attempt to require members of the clergy to comply with such a standard, however, could very well restrict their right freely to exercise and practice their religion. Indeed, as

the federal district court said in *Schmidt v. Bishop, supra,* 779 F. Supp. 321 at 328:

> Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible.

Based upon this consideration, several courts have gone so far as to conclude that no claim, short of an intentional battery, can lie against a pastor or the religious organization as a result of incidents occurring during pastoral counseling. *See Schieffer v. Catholic Archdiocese, supra* (no liability for emotional damage resulting from consensual sexual relationship); *Schmidt v. Bishop, supra* (no liability for sexual relationship commencing when the plaintiff was only 12). *See also Bladen v. First Presbyterian Church, supra.*

On the other hand, both our supreme court in *Destefano* and the Oregon Court of Appeals in *Christofferson v. Church of Scientology, Inc., supra,* have distinguished a claim based upon clergy malpractice, requiring the judicial promulgation of professional standards, from a claim for breach of some fiduciary obligation that may arise from the confidential relationship between the parties in a counseling setting. This distinction was reemphasized in *Moses v. Diocese of Colorado, supra,* at 321 n. 13 in the following language:

> The fundamental difference between the two causes of action is the former [breach of fiduciary duty] is a breach of trust and *does not require a professional relationship or a professional standard of care,* while the latter [malpractice] is an action for negligence based on a professional relationship and a professional standard of care.

(emphasis supplied)

While the *Moses* language referred to the lack of any *requirement* for proof of a professional standard of care in order to prosecute a claim for the breach of a fiduciary obligation, the distinction drawn by *Moses* was, we think, a recognition that it would be improper under the First Amendment to attempt to *impose* any professional standard of care upon a pastoral counselor, at least in those instances in which the pastor asserts that his conduct is based upon a sincerely held religious belief.

In contrast to a claim based upon the violation of a standard of conduct adopted by professionals, the violation of a fiduciary duty depends upon the nature of the specific duties owed by the fiduciary, which the court determines as a matter of law and upon which it instructs the jury. *See CJI-Civ. 3d* 26:3 (1989) (Notes on Use and Source and Authority). And, under an outrageous conduct claim, the defendant's conduct is to be tested by the standards adopted by civilized society, as a whole. *Rugg v. McCarty,* 173 Colo. 170, 476 P.2d 753 (1970).

It is, then, in the light of our supreme court's distinction between the two claims that we must evaluate whether the admission of the expert opinion here was error.

Plaintiffs offered four experts. The first, a minister and director of a church-operated center for domestic and sexual abuse prevention, was tendered as an "expert in theology" and upon "procedures and practices in church settings necessary to prevent reasonably foreseeable harm." This witness testified, generally, to the fact that the religious counsellor is often looked upon as someone who has been designated as a church leader and that the persons who counsel with that person place their trust in that authoritarian figure. When that authority figure engages in improper "sexual contact or activity" with the parishioner, harm results because the parishioner feels that he or she has been fundamentally betrayed.

This testimony was admissible under *Moses* because it addressed the question whether there existed a fiduciary relationship between Wolfe and the minor. See Restatement (Second) of Torts §874 (1979); *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508 (Colo. 1986) (existence of such a relationship is a question of fact).

However, over objection, this witness was also allowed to testify that "nudity or partial nudity" is "inappropriate in the pastoral relationship." This witness said that, while such might be appropriate in either a "medical setting" or in a "situation with a licensed massage therapist," such activity is "unnecessary" and "inappropriate" in either a therapeutic or a pastoral relationship.

The second expert was accepted as a person "qualified to give opinions on diagnosis, treatment, and prognosis" in the psychiatric field. This witness was first permitted, over objection, to testify that the description given by the minor of Wolfe's "counseling" constituted

"sexual abuse." He was also permitted to testify that, in his "professional experience," it is never "appropriate" to remove the shirt of a counselee, or to remove his pants, or to rub his back, or to rub his thigh. According to this expert, "in terms of therapy [such acts] would be considered to be sexually abusive."

The third witness, a licensed professional counselor, was offered as an expert in psychotherapy. The substance of this witness' testimony can be summarized in the following excerpt:

> Q. Have you formed an opinion, within a reasonable degree of psychological probability, as to whether or not, based on the description given to you by [the minor], [the minor] was sexually abused?
>
> A. Yes, I have.
>
> Q. What's that opinion?
>
> A. My opinion is yes, under the opinion that with current law in psychological ethics, going back to the early 80's that any touching of – any sexual-type touching can be interpreted as massaging legs up to the crotch, massaging the back. It's just highly unadvisable in this field to be touching people, especially under the clothing.
>
> Q. Mr. Sims, were you here for part of Mr. Wolfe's testimony last week?
>
> A. Yes, I was.
>
> Q. Do you believe – can you tell the jury whether or not there's anything in what he said that supports the kind of touching that he says he did?

A. As far as Biblically?

Q. Biblically or therapeutically.

A. Therapeutically – either therapeutically or Biblically there's no evidence that should happen or it is good for people.

. . . .

Q. . . . [I]s there evidence that children should be touched during therapy?

A. Yes. Children should never be touched during therapy. The most touching, if you want to call it that, would be as child is leaving, if they initiate a side hug at the door, or the parents are there and it's safe. It should not be forced upon them or done without their permission or request.

The final witness was an expert in psychology who had extensive experience in supervising pastoral counselors. During voir dire, this witness proposed that she would offer opinions as to "how a minister in any church would conduct counseling insofar as it relates to certain behaviors" and opinions as to the manner in which Wolfe should have conducted his pastoral counseling. This witness then testified, in part, as follows:

Q. Is there anything about the way that Homer Wolfe used *The Gift of Sex* in therapy that was dangerous?

A. The notion of having people compare their genitals to those in the book to see if they've been properly circumcised, I think is not something that's legitimate counseling or likely to be helpful. It's quite likely to be confusing and

> harmful, particularly in a pastoral counseling context.
>
> Q. Is there anything about the nudity that is described in one of the exercises that is potentially dangerous in a counseling situation?
>
> A. Yes. The book recommends to couples who are attempting to improve their sex life within a Christian framework to get to know their bodies and look at themselves nude and feel better about their bodies, and the book suggests you do that. That, obviously is a highly risky proposition to do in a counseling session or with an individual.

Some of this testimony, then, condemned any touching of a minor counselee, even that which could be considered non-sexual in nature. This testimony, therefore, articulated a standard for the conduct of pastoral counseling and tended to establish that, even if Wolfe's motives were innocent, he violated such standard if he touched the minor. In addition, in at least one instance, the expert was allowed to state that Wolfe's belief, that his touching was a means of enhancing communication with God, had no therapeutic or *Biblical* support.

The receipt of this expert testimony was prejudicially erroneous for several reasons.

First, a portion of this testimony was irrelevant. For example, there was no evidence that Wolfe asked the minor to compare his genitals to photographs in any book. Hence, the "appropriateness" of any such conduct was not relevant to any portion of the minor's claim. At best, it related to incidents allegedly occurring during sessions with other counselees.

Second, some of this testimony called into question the validity of Wolfe's beliefs concerning the efficacy of touching, which he claimed to be grounded in his religious principles. To the extent that such testimony was intended to present a jury question as to whether Wolfe's techniques were, in fact, valid from a Biblical standpoint, the First amendment prohibited its consideration for this purpose. *See Wolf v. Rose Hill Cemetery Ass'n, supra,* at 1009 (First Amendment prohibits the judicial resolution of disputes "by inquiring into and resolving disputed issues of religious doctrine and practice").

Third, this testimony, at least in several instances, referred to the appropriateness of touching from a *therapeutic* standpoint. To this extent, it was irrelevant. *Destefano* expressly held that a pastor's counseling activities are not to be governed by standards applicable to a secular therapist.

Further, this testimony sought to establish a professional standard for *pastoral* counseling, *i.e.,* that a minor counselee should never be touched by any counselor. And, unless the proffering of such testimony was intended to allow the jurors to determine that Wolfe violated this professional standard, it was irrelevant to any issue that they were to decide. But, to allow the jurors to assess liability against Wolfe for violating this standard was tantamount to imposing liability for "malpractice," *i.e.,* for the violation of a professional standard of conduct. *See Moses v. Diocese of Colorado, supra.*

Other evidence presented a genuine issue whether Wolfe touched the minor and, if so, whether such touching was for his personal gratification. And, the jury

certainly could have found that such was the case. Based upon the expert testimony, however, the jurors also could have found that, even if Wolfe's reason for the touching was innocent, such touching was improper.

Further, the confusion of the issues created by this expert testimony was exacerbated by the court's instructions to the jury.

At no point in those instructions were the jurors informed upon the specifics of the parties' assertions. They were not informed that plaintiffs' allegation was that Wolfe engaged in inappropriate touching for personal gratification purposes. And, as noted, the court rejected Wolfe's tendered instruction concerning his liability, or lack thereof, if his actions were based upon a sincerely held religious belief and failed to give any instruction upon the subject.

Further, while the jurors were properly presented with the issue of the existence of any fiduciary relationship between the parties, the court failed to instruct them with respect to the nature of the duty owed by Wolfe and the Church in the circumstances or with respect to the basis for plaintiffs' claim. *See CJI-Civ. 3d* 26:3 (1989) (Notes on Use) ("This instruction should be used . . . to describe the fiduciary duty or duties the plaintiff claims the defendant breached and the breach of which, under the applicable law and evidence in the case, would be appropriate for the jury to determine.").

Given this lack of judicial guidance, the jury might well have accepted the specific standard of conduct described by the experts as the standard by which to measure Wolfe's actions. This is particularly so because

plaintiff's counsel, in her final argument, was allowed to assert that Wolfe had no "qualifications" for counseling. If the jurors applied such a standard, however, the test used by them would have been indistinguishable from the test used for a professional malpractice claim. *See Moses v. Diocese of Colorado, supra.*

While the experts' testimony with respect to the nature of the relationship between the parties engaging in pastoral counseling was properly received, as was their testimony designed to illustrate the nature of the damage caused the minor, the testimony with respect to the *standards* to be applied to a pastoral counselor was improper. And, given the record here, the receipt of such testimony was not harmless.

III.

Among the issues raised by defendants that may arise on retrial is Wolfe's assertion that the trial court erred in admitting under CRE 404(b) the testimony of two witnesses with respect to other alleged misconduct by Wolfe. We disagree.

CRE 404(b) provides, in relevant part, that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *People v. Spoto*, 795 P.2d 1314 (Colo. 1990), our supreme court concluded that, taken together, CRE 401,

403, and 404(b) require that four factors be considered in determining if evidence of other transactions is admissible: (1) whether the proffered evidence relates to a material fact; (2) whether the evidence is logically relevant to any contested issue; (3) whether the logical relevance is independent of the prohibited inference that defendant has a bad character and acted in accordance with that character; and (4) whether the probative value of the proffered evidence is substantially outweighed by any unfair prejudice it might create.

Here, one witness, who was an adult at the time Wolfe counseled with him, testified that, during his counseling sessions with Wolfe, Wolfe had him remove his shirt and pants after which Wolfe would massage his back, chest, and thighs while stating that God loved him. Later in their counseling relationship, Wolfe allegedly had the counselee completely disrobe in front of a mirror, whereupon Wolfe then allegedly inspected the counselee's penis and asked to touch it. The witness refused Wolfe's request. Finally, this witness testified that, in later counseling sessions, Wolfe had him masturbate while Wolfe's hand was on top of his.

The second witness, who was a minor at the time he was counseled by Wolfe in 1981 or 1982, said that, during his first counseling session, Wolfe had him remove his shirt and pants and massaged him. Wolfe also allegedly asked to inspect the witness's genitals, felt them, and commented that he was properly circumcised. This witness testified that, after this incident, he never returned to Wolfe for counseling, but that he did not report the incident to the church elders until 1989.

The testimony of these two witnesses is partially consistent with Wolfe's description of his counseling technique. He testified that he had counseled both these witnesses and that he had massaged both of them. He also testified that he had inspected the minor witness' genitals and that he also had assisted the adult witness in conducting the disrobing exercise in front of a mirror in Wolfe's office. Wolfe repeatedly denied, however, that there had been any genital contact or any sexual motive involved in his counseling sessions with either witness.

Further, Wolfe denied any recollection of any physical contact – genital or non-genital – with the minor. Alternatively, he asserted that any genital contact with the minor that might have occurred was incidental and unintentional.

The trial court held that the proffered testimony satisfied all four tests set forth in *Spoto*. We agree.

First, the testimony of the two witnesses related to material issues of fact, *i.e.*, whether Wolfe's counseling techniques exhibited a pattern of behavior motivated by his sexual interests; whether Wolfe had, in fact, touched the minor plaintiff's genitals; and whether any such contact was accidental or intentional. Plaintiffs' assertion was that Wolfe's conduct with the minor was merely part of a pattern of predatory sexual behavior involving male counselees whom Wolfe knew to be vulnerable because of past traumatic experiences.

Second, such evidence was also logically relevant because it had the tendency to make the existence of Wolfe's alleged conduct with the minor plaintiff more probable. *See People v. Carlson*, 712 P.2d 1018 (Colo. 1986).

Third, the logical relevance of this evidence is independent of the prohibited inference that defendant has a bad character and that he acted in accord with that character. Considering that each prior incident took place during a counseling session, involved a male counselee who was emotionally vulnerable because of a prior trauma of which Wolfe was allegedly aware, and involved disrobing and alleged genital contact, we conclude that these prior incidents are sufficiently similar to the circumstances here to make them probative of whether Wolfe did touch the minor and, if so, whether it was intentional, sexually-motivated contact rather than unintentional or incidental contact.

While this evidence admittedly might also lead to the inference that Wolfe acted in accordance with his alleged bad character, the fact that such an inference may be drawn does not render the evidence inadmissible, so long as the proffered evidence has a logical relevance independent of that inference. *See People v. Snyder,* 874 P.2d 1076 (Colo. 1994); *People v. Spoto, supra.*

Finally, we cannot conclude, as a matter of law, that the potential prejudicial effect of this evidence outweighs its probative value. A trial court is vested with wide discretion in determining the potential prejudicial impact of proffered evidence, and we will not reverse the trial court's ruling unless it is manifestly erroneous. *See Campbell v. People,* 814 P.2d 1 (Colo. 1991); *People v. Williams,* 790 P.2d 796 (Colo. 1990).

Further, our supreme court has mandated that "we must assume the maximum probative value that a reasonable fact finder might give the evidence and the

minimum unfair prejudice to be reasonably expected." *See People v. Lowe*, 660 P.2d 1261, 1264 (Colo. 1983); *see also People v. Aldrich*, 849 P.2d 821 (Colo. App. 1992) (admission of magazines containing explicit sexual material found at defendant's home tended to corroborate victim's allegation of sexual abuse and were more probative than prejudicial).

Here, our review of the record convinces us that the trial court's admission of this evidence was not manifestly erroneous, and thus, under similar circumstances, it may properly be admitted on retrial.

The evidence of these two witnesses, together with the testimony that two other parishioners had met with the Church elders and had related to them accusations against Wolfe made by other young male counselees, was allowed also to be considered by the jurors on the issue whether the Church had notice of Wolfe's activities. The Church asserts that its admission for this purpose constituted prejudicial error. We disagree.

An essential element of plaintiffs' negligent hiring and supervision claim against the Church was the Church's actual or constructive knowledge of any derelictions by Wolfe. *See Destefano v. Grabrian, supra.* Such evidence was properly admissible for this limited purpose, and the jury was properly instructed to consider it only for this purpose. *See Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982); *Hansen v. Lederman*, 759 P.2d 810 (Colo. App. 1988).

Finally, we are convinced that the trial court correctly determined that the probative value of such of such evidence outweighed its prejudicial impact. *See People v.*

Williams, supra; People v. Lowe, supra. Hence, again, under similar circumstances and with similar instruction, such evidence may be admitted on retrial.

IV.

The Church was determined to be liable for Wolfe's breach of the fiduciary duties owed both to the mother and to the minor, based on the claim that it ratified Wolfe's actions. The Church asserts, however: (1) that the alleged intentional actions of Wolfe here cannot be ratified; (2) that the Church cannot be rendered liable under a ratification theory for its employee's tortious conduct that is outside the scope of employment; and (3) that insufficient evidence of ratification was presented. We disagree with all three contentions.

A.

An employer can assume liability for the tortious conduct of its employee by approving and ratifying such conduct, irrespective whether that conduct is intentional or negligent. *See Frick v. Abell,* 198 Colo. 508, 602 P.2d 852 (1979) (claim that police department ratified assault and battery by police officer); *Stortroen v. Beneficial Finance Co.,* 736 P.2d 391 (Colo. 1987) (principal may become liable for agent's misrepresentations to buyer). Thus, we reject the Church's assertion that Wolfe's conduct, because it constituted an intentional tort, cannot be the subject of ratification.

B.

An employer may ratify the unauthorized act of its employee, *i.e.*, an act not within the scope of the employment, and thereby become obligated to the same extent as if the principal had originally authorized the act. *See Poudre Valley Furniture Co. v. Craw*, 80 Colo. 353, 251 P. 543 (1926); *M.S.P. Industries, Inc. v. Diversified Mortgage Services, Inc.*, 777 P.2d 237 (Colo. App. 1989).

Hence, it is no defense for the Church here that Wolfe's alleged conduct with the minor fell outside the scope of his defined job responsibilities. *See generally* 1 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* §4.5 (1983).

C.

In order for an employer to be liable by ratification for the unauthorized act of its employee, the evidence must establish the employer's adoption and confirmation of that act. *See Nunnally v. Hilderman*, 150 Colo. 363, 373 P.2d 940 (1962). And, an employer must have full knowledge of the character of the employee's act before it may be said to have ratified that act. *Adams v. Paine, Webber, Jackson & Curtis, Inc.*, 686 P.2d 797 (Colo. App. 1983), *aff'd*, 718 P.2d 508 (Colo. 1986).

The fact that an employer retains an employee after gaining knowledge of the employee's tortious conduct is evidence that may prove ratification of the employee's acts. However, retention of an employee, without more, is not conclusive evidence of such ratification. *See Frick v.*

Abell, supra. Further, numerous acts of an employee committed over a period of time can constitute evidence of an implied ratification of that conduct by the employer. *See Goetz v. Security Industrial Bank,* 508 P.2d 410 (Colo. App. 1973) (not selected for official publication). *See also* Restatement (Second) of Agency §91 comment c (1958) ("knowledge [necessary for ratification] by the purported principal can be inferred . . . when he has such information that a person of ordinary intelligence would infer the existence of the facts in question").

The question whether an employer has ratified its employee's unauthorized tort is one of fact. And, a fact finder may determine that an employer has ratified its employee's tortious acts from any course of conduct, including an omission to act, that reasonably tends to demonstrate an intention on the part of the employer to ratify that conduct. *See Brown v. Burlington Industries, Inc.,* 93 N.C. App. 431, 378 S.E.2d 232 (1989) (employer's ratification of employee's sexual harassment of fellow worker); Restatement (Second) of Agency §§93 and 94 (1958).

Here, the evidence was sufficient to allow the finding that the Church elders were aware of Wolfe's alleged inappropriate counseling behavior as early as 1986. It began receiving complaints from various parishioners with respect to his conduct, starting in 1986 and continuing through 1987 and 1988. Indeed, the minutes of several Church elders' meetings during 1986 and 1987 reflect that the elders were concerned with respect to the Church's "liability and responsibility" for Wolfe's counseling; that

Wolfe might be involved in "medical," rather than religious counseling; and that "many parents are complaining" about Wolfe. Further, there was evidence, as noted, of specific complaints against Wolfe made by various parishioners, and there was other evidence that the Church failed effectively to respond to such allegations.

Thus, under a similar evidentiary posture on retrial, recovery on a theory of ratification should again be presented for jury resolution.

V.

On cross-appeal, the minor asserts that the trial court erred in allowing the jury to consider the question of the minor's comparative negligence as a defense to his claim that the Church was negligent in its hiring and supervision of Wolfe. On this issue, the jury found that the minor was four percent negligent, and the court reduced his damages accordingly. *See* §13-21-111, C.R.S. (1987 Repl. Vol. 6A). We agree that this issue should not have been submitted to the jury.

Generally, a child seven years of age or older is under a duty to exercise the degree of care that would reasonably be expected of a child of like age, intelligence, and experience. *See Calkins v. Albi,* 163 Colo. 370, 431 P.2d 17 (1967); *Benallo v. Bare,* 162 Colo. 22, 427 P.2d 323 (1967). A child who fails to exercise such ordinary care in protecting himself or herself from an unreasonable risk of harm may be found negligent in contributing to his or her own injuries. *See Benallo v. Bare, supra; Lakeside Park Co. v. Wein,* 111 Colo. 322, 141 P.2d 171 (1943). Comparative negligence principles, however, are applicable only if there is

evidence that would support a finding that both parties are at fault. *Dunham v. Kampman*, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977); *Powell v. City of Ouray*, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Here, there was no evidence that would support a finding that the minor unreasonably subjected himself to the risks associated with Wolfe's counseling.

The minor was only seven when he entered counseling, and he continued to see Wolfe until the time he entered middle school. He entered into the counseling relationship only at Wolfe's behest and at his mother's direction. Indeed, there was testimony from both the minor and the mother that he was often quite reluctant to see Wolfe and had to be persuaded to do so. The minor also testified that Wolfe told him that the counseling was confidential and that the minor should not discuss with others the contents of their sessions.

Finally, plaintiffs' expert opined that, in situations involving the abuse of a child by an adult in a position of trust, it is common for the child not to report it to others. The Church offered no testimony to contradict this view, nor did it offer any testimony respecting the reasonable standard of conduct of a child of the minor's age in such circumstances.

We conclude, therefore, that the evidence failed to establish, as a matter of law, any negligence on the part of the minor. Hence, on retrial, unless there is additional evidence produced on this issue, the question of the minor's negligence should not be considered by the jury.

The judgments in favor of the plaintiffs are reversed, and the cause is remanded to the trial court for a new trial in accordance with the views expressed in this opinion.

JUDGE TAUBMAN specially concurs.

JUDGE DAVIDSON dissents.

JUDGE TAUBMAN specially concurring.

I concur with the conclusion in the dispositive opinion that a new trial is necessary because the judgment resulted in duplicative or inconsistent damage awards and that the trial court admitted improper expert testimony. I further agree that, on retrial, assuming the presentation of similar evidence as in the first trial, the trial court should submit to the jury an instruction in the form set forth in the dispositive opinion that would require a verdict in favor of defendants if the jury determines, *inter alia*, that Wolfe's conduct was based on a sincerely held religious belief. Further, I agree with the dispositive opinion's treatment of the remaining issues and the cross-appeal. However, I write separately because of the importance I attach to defendants' claims that liability could not be imposed upon them without violating their rights under the free exercise clause of the First Amendment.

As the dispositive opinion notes, Wolfe consistently maintained that his counseling methods, including the massage technique, were inspired by his religious beliefs which were based on his interpretation of the Bible. Wolfe also consistently asserted that his counseling techniques were not motivated by any sexual desires on his part.

Instead, he maintained that he employed the massage technique to facilitate communication between the counselee and God.

The central issue presented by this case, in my view, is that left unanswered by the supreme court in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988). There, in a case involving alleged sexual misconduct by a Roman Catholic priest, the court recognized that: "If the alleged misconduct of [the defendant] was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult First Amendment issue." *Destefano v. Grabrian, supra*, at 284.

In *Destefano* and, more recently, in *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), the supreme court has held that civil actions against clergy members and their superiors that involve claims of breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record. In those cases the court declined to grant churches and clergy broad immunity against being sued in civil courts.

Nonetheless, the defendants in those cases did not claim that their conduct was dictated by sincerely held religious beliefs or was consistent with their religious practices. However, the "difficult First Amendment issue" anticipated by the supreme court is precisely the situation we have here. Defendant Wolfe consistently has maintained that his counseling of the minor plaintiff was dictated by his sincerely held religious beliefs and was consistent with the practice of his religion.

Unlike in *Moses*, in which the defendants' First Amendment claims were first raised in the supreme court, Wolfe and the Bear Valley Church of Christ raised their First Amendment contentions early on. They moved for directed verdicts, based on the First Amendment, after plaintiffs' case-in-chief and at the conclusion of the presentation of evidence. The trial court denied those motions. In addition, the trial court denied defendants' similar motions for judgment notwithstanding the verdict. Finally, defendants tendered a jury instruction, which the trial court denied, regarding whether Wolfe's conduct was motivated by a sincerely held religious belief. Consequently, the jury was never informed that the First Amendment was implicated in any way whatsoever.

The First Amendment protects against state action involving the "establishment of religion, or prohibiting the free exercise thereof." State action includes common law tort rules, *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and court action. *Bernson v. Koch*, 35 Colo. App. 257, 534 P.2d 334 (1975).

Whether Wolfe's beliefs are arguably religious in nature is a legal question which must be determined by the court. Courts are to decide whether a person's beliefs are, in his or her own scheme of things, religious. *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965).

Beliefs are adequately religious even if they are not acceptable, logical, consistent, or comprehensible. Only claims "so bizarre, so clearly non-religious in motivation should be denied free exercise protection." *Thomas v.*

Review Board, Indiana Employment Security Division, 450 U.S. 707, 715, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624, 632 (1981). All that matters is that the person hold the religious belief. *United States v. Ballard,* 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

Hence, a party must show that there is a coercive effect against the practice of his or her religion when challenging governmental action as an infringement of his or her free exercise rights. *Destefano v. Grabrian supra, citing Abington School District v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Thus, when making the determination whether a belief is religious, the court must look to the defendant's assertions rather than the contentions made in the complaint or the evidence presented by the plaintiff. If the court concludes that a defendant's assertions are not based on a religious belief, the First Amendment does not afford protection. *See Africa v. Commonwealth of Pennsylvania,* 662 F.2d 1025 (3d Cir.), *cert. denied,* 456 U.S. 908, 102 S.Ct. 1756, 72 L.Ed.2d 165 (1982) (holding organization was not a religion because it did not address fundamental and ultimate questions, was not comprehensive in nature, and did not exhibit similar manifestations associated with more traditional religions); *Church of the Chosen People v. United States,* 548 F. Supp. 1247 (D. Minn. 1982) (holding "Demigod Socko Pantheon" was not a religion, in part because it was not organized and operated exclusively for religious purposes).

Here, defendants have consistently asserted that Wolfe's conduct was based on his religious beliefs. Furthermore, Wolfe's assertions regarding his use of massage

as a spiritual counseling technique are not so bizarre or clearly non-religious that they should be denied First Amendment protection. In fact, many Christian sects advocate the laying on of hands by clergy on parishioners for consecration, blessing, invocation, and communication with God. *See Dictionary of Christianity in America* 636 (R. Linder ed. 1990).

If the court concludes that a defendant's beliefs are religious, the First Amendment prohibits any governmental action, including tort remedies, that substantially burdens the free exercise of religion, unless there is a compelling state interest and unless the least restrictive means are employed to attain that interest. *Thomas v. Review Board, Indiana Employment Security Division, supra; Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). However, the First Amendment does not provide protection where a defendant's beliefs are not sincerely held. *United States v. Seeger, supra.*

In 1990, the Supreme Court held that the compelling state interest test need not be followed where the impingement on free exercise of religion involves a facially neutral criminal statute of general applicability. *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). However, to the extent *Smith* departed from the prior "free exercise" jurisprudence concerning facially neutral laws of general applicability, it has been legislatively overruled by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C §2000bb (1993). *See Western Presbyterian Church v. Board of Zoning Adjustment,* ___ F. Supp. ___ (1994 WL 487861, September 8, 1994 (D.D.C.)).

Furthermore, the *Smith* decision has been widely criticized as presenting competing answers with pre-*Smith* law to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. ___, ___, 113 S.Ct. 2217, 2240, 124 L.Ed.2d 472, 507 (1993) (Souter, J., concurring). *See also* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

RFRA expressly restores the compelling state interest test in cases involving the free exercise clause of the First Amendment and requires that, even when the law undergoing constitutional scrutiny may be a neutral law of general applicability, government actions that substantially burden the exercise of religion be the least restrictive means of furthering that interest. As a result, RFRA modifies state tort law pursuant to Congress' power to enforce the Fourteenth Amendment legislatively. 42 U.S.C. §2000bb-3 (1993).

Applying this analytical framework here, I agree with the dispositive opinion's conclusion that by failing to give an instruction concerning whether Wolfe's conduct was dictated by his sincerely held religious beliefs, the trial court committed reversible error. And, as noted, I agree that the form of an instruction as stated in the dispositive opinion is appropriate in the circumstances presented here because it would adequately protect defendant's First Amendment rights. Nonetheless, I would go further and require an instruction limited to whether Wolfe's conduct was motivated by a sincerely held religious belief.

In my view, allowing a tort remedy without, at a minimum, an instruction in the form set forth in the dispositive opinion would substantially burden the free exercise of religion by Wolfe and the Church. *See* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933 (1989) (if government's ends can reasonably be achieved without the imposition of the free exercise burden, relief from the burden may be appropriate). I further conclude that, without such an instruction, there is no compelling state interest here to allow plaintiffs to pursue a tort remedy.

The First Amendment prohibits the court from interpreting or weighing church doctrine. *Moses v. Diocese of Colorado, supra.* In my view, the dispositive opinion properly concludes that attempting to impose any professional standard of care upon a pastoral counselor is prohibited by the First Amendment when the pastor asserts that his or her conduct is based on a sincerely held religious belief. Allowing a tort claim here in the absence of a finding that Wolfe's conduct was not dictated by a sincerely held religious belief would require consideration of the validity of ecclesiastical matters and, therefore, such a claim is barred by the First Amendment. *See Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1966); *Van Osdol v. Vogt*, ___ P.2d ___ (Colo. App. No. 93CA1032, August 25, 1994).

Resolution of the First Amendment issue here is indeed difficult since it involves weighing the strong societal interests in allowing tort remedies against those

found guilty of sexual harassment or abuse against the freedom of religion claims of a church and minister. Nevertheless, conduct that many people might find objectionable may be protected under the free exercise clause. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah, supra* (city ordinances prohibiting animal sacrifices violated the free exercise clause since they effectively prohibited only sacrifice as practiced by the Santeria religion). *Harris v. Harris,* 343 So. 2d 762 (Miss. 1977) (mother, who belonged to a fundamentalist sect which believed in snake handling, had a right to practice her faith and to indoctrinate her child in her religious beliefs so long as she had custody and there was no proof that child was exposed to risk of being bitten by a snake).

In *Destefano,* the defendants conceded that the priest's conduct fell outside the practices and beliefs of the Roman Catholic church and, thus, was not protected by the First Amendment. No comparable admissions were made here. Instead, Wolfe has consistently maintained that his actions were legitimate manifestations of pastoral counseling. He argues that his pastoral counseling methods were motivated by the Scriptures and were purely ecclesiastical in nature. Hence, a decision that examines Wolfe's counseling techniques would require interpretation of church doctrine in violation of the First Amendment.

Indeed, that is precisely what occurred during the jury trial. Plaintiffs presented expert witnesses, as the dispositive opinion has clearly described, who attempted to establish a standard of care for pastoral counseling. Similarly, several elders testified for the Church about their understanding of Biblical counseling. In short, the

jury was asked to weigh church doctrine, after hearing not only from lay witnesses but from "experts" on church doctrine. If the jury finds on retrial that Wolfe's conduct was dictated by a sincerely held religious belief, then the First Amendment would prohibit plaintiff's breach of fiduciary duty and outrageous conduct claims because those tort remedies would substantially burden the free exercise of his religion without any compelling state interest.

However, even if a compelling state interest existed, the court must use only the least restrictive means in regulating religious activities. *Thomas v. Review Board, Indiana Employment Security Division, supra.* In my view, to impose liability based on claims of breach of fiduciary duty and outrageous conduct, where a defendant's conduct is based on a sincerely held religious belief would require the trier of fact to make prohibited inquiries into religious faith and, thus, would violate the least restrictive means test. *See Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra.*

Accordingly, I agree that, on retrial, the trial court should give a jury instruction in the form set forth in the dispositive opinion as to whether Wolfe based his actions on a sincerely held religious belief. *See United States v. Seeger, supra* (whether claimant's religious belief is sincerely held is question of fact).

Finally, my views based upon the First Amendment would not allow wrongful sexual conduct by a clergyman to go unpunished. In many cases, such as *Destefano* and Moses, the conduct complained of will not be alleged to

be motivated by a sincerely held religious belief. In those situations, a tort remedy would be permissible.

In other cases, as here, where the First Amendment is asserted as a basis for challenged conduct, plaintiffs could assert that such conduct was not based upon a sincerely held religious belief and would be entitled to have a jury resolve that issue. Furthermore, even in circumstances in which conduct is said to be based upon a sincerely held religious belief and such claim is upheld by a jury, the state could still prosecute a clergyman for violation of the state's criminal laws. *See Schmidt v. Bishop, supra.*

Thus, while the issues presented here are indeed difficult to resolve, they cannot be resolved properly without consideration of the First Amendment.

JUDGE DAVIDSON dissenting.

Because I conclude that the protection of the First Amendment free exercise clause is not available to these defendants and therefore no instructional error occurred, because I disagree that the plaintiffs' experts necessarily expressed that Wolfe violated a professional standard of care, and because I perceive no reversible error as to damages, I would affirm the judgment with one modification. Therefore, I respectfully dissent.

I.

First Amendment

A.

In my view, Wolfe's assertions do not pass the preliminary test of whether his conduct was a part of a

sincerely held religious belief. Hence, no jury instruction on the issue was necessary.

1.

If a person raises the free exercise clause as a defense, the threshold question is whether the *conduct complained of* is religious. *See Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988).

Thus, it is not sufficient for Wolfe to claim free exercise clause protection because he is a minister, or because the counseling sessions included prayer and discussion of spiritual matters. *See Destefano v. Grabrian, supra.* To invoke free exercise clause protection, the conduct in question must be a professed religious practice or rooted in a religious belief. *See Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

According to the evidence, the massage of young males – as practiced by Wolfe and which, by his own admission, included removal of their shirts and pants, and massage of their backs and legs – is contrary to a generally held societal view that children should not be touched in that manner outside of bona fide medical treatment.

Wolfe argues, nonetheless, that he is entitled to reject this view and use his massage technique in spiritual counseling.

In order successfully to defend his conduct on free exercise grounds, however, Wolfe must show that this assertion rests upon a religious foundation; if his choice to use massage is, instead, philosophical or personal, it

does not warrant free exercise protection. *See Wisconsin v. Yoder, supra.*

The trial court found, as a matter of law, that Wolfe posited no religious basis for his massage technique. I agree.

According to the record, even though he claimed that he could not remember using massage on the minor plaintiff, Wolfe explained that he used massage to assist his counselees in communicating their problems to him so he could help them. Since he believed human touch to be one of the best methods of communication between people, he chose this type of massage to help counselees relax and, consequently, communicate more freely *with him.*

Thus, although his ultimate goal in spiritual counseling was for counselees to receive help from God in resolving their problems, by Wolfe's own testimony, his choice to use massage with children had no biblical, doctrinal, or spiritual basis, justification, or underpinning. Despite the religious setting, the described massage technique simply reflects Wolfe's choice of a relaxation and communication method between himself and his counselees.

2.

Furthermore, even if Wolfe's conduct was a religious practice, the free exercise clause is inapplicable because the jury, by its verdicts against him, necessarily found that Wolfe's belief in the use of massage as a beneficial counseling technique was not sincerely held. In other

words, the jury determined that Wolfe used massage for personal gratification and not for the spiritual benefit of his counselees, therefore, that the jury was not instructed to consider whether his conduct was part of a religious belief is immaterial.

The jury was instructed that, in order to find for plaintiffs on the breach of fiduciary duty claim, it must find that Wolfe was acting as a fiduciary. It was further instructed that "[o]ne who is acting as a fiduciary must act with the utmost good faith and loyalty on behalf of, and for the benefit of that person."

Wolfe asserted that he used massage so that the counselees could receive more effective assistance with their problems. The jury, however, found that as to the minor plaintiff, Wolfe did not act with utmost good faith and loyalty, thus rejecting the premise that Wolfe sincerely believed massage would benefit the counselees. In fact, the jury specifically found that, when committing the offending acts, Wolfe was acting outside the scope of his employment as a pastoral counselor.

Similarly, the verdict against Wolfe on the outrageous conduct claim required a specific finding by the jury that Wolfe engaged in intentional or reckless behavior causing severe emotional distress. Such a finding also is irreconcilable with his assertion that he sincerely believed massage would improve the counseling experience.

B.

Finally, even assuming, *arguendo*, that Wolfe's behavior was based on a sincerely held religious belief, I do not

agree that his otherwise tortious conduct is entitled to First Amendment protection.

The possession and enjoyment of all constitutional rights are subject to reasonable state restriction essential to safety, health, peace, good order, and the equal enjoyment of the same rights by others. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When children are involved, the state's authority is quite broad. *Prince v. Massachusetts*, 321 U.S. 158, 169, 64 S.Ct. 438, 443, 88 L.Ed. 645, 654 (1944) (child labor is within the state's power to regulate "whether against the parent's claim to control of the child or one that religious scruples dictate contrary action").

Conduct which poses a substantial threat to public safety, peace, or order is within the state's power to proscribe, even if it is in accord with the actor's personal religious convictions. And, when weighed against the actor's First Amendment rights, the balance will tilt in favor of the state's interest in controlling such conduct. *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *see also Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879).

Accordingly, free exercise protection stops where infringement on the rights of other, non-consenting persons, begins. *See Erickson v. Christenson*, 99 Or. App. 104, 781 P.2d 383 (1989) (claims against pastor for intentional infliction of emotional distress and breach of confidential relationship not barred by First Amendment); *Van Schaick v. Church of Scientology*, 535 F.Supp. 1125 (D. Mass. 1982)

(First Amendment provided no defense to claim of intentional infliction of emotional distress for activities conducted against former member); *cf. Lawson v. Commonwealth*, 291 Ken. 437, 164 S.W.2d 973 (1942) (free exercise clause does not preclude state from prohibiting religious practice that endangers participants or others).

Thus, even a traditional practice, such as "laying on of hands" to heal or to communicate with God, could amount to an offensive or harmful touch and constitute an intentional tort if used on a non-consenting individual who held strong objections to that technique. *See CJI-Civ.3d 20:5* (1989) (elements of battery). The First Amendment would not provide protection from liability for any harm the touch might have caused.

In contrast, religious practices which do not interfere with the rights or interests of others may not be prohibited or punished merely because they are different from that of the majority. *See Wisconsin v. Yoder, supra* (Amish tradition of discontinuing formal education after eighth grade); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (refusal to accept employment requiring active participation in the direct production of armaments); *Sherbert v. Verner, supra* (refusal to accept employment requiring work on Saturdays); *cf. Watson v. Jones*, 80 U.S. 679, 13 Wall. 679, 20 L.Ed. 666 (1871) (The full and free right to practice any religious principle, which does not infringe on personal rights, is accorded to all persons). *See* 42 U.S.C. §2000bb (1993) (the compelling state interest test as adopted in *Sherbert v. Verner* reestablished by the Religious Freedom Restoration Act).

Similarly, a religious practice which would otherwise constitute an intentional tort may receive First Amendment protection if performed upon a member of the same religious society, because the offended member expressly or impliedly has consented to the society's doctrines and practices and, thus, arguably, to the conduct in question.

Consent is a defense that essentially nullifies a claim of intentional tort; one cannot simultaneously consent to and complain of the same act. *See* Restatement (Second) of Torts §892 (1977); *People ex rel. City of Arvada v. Nissen*, 650 P.2d 547 (Colo. 1982). All persons voluntarily united in membership in a religious society impliedly consent and submit themselves to its ecclesiastical decisions; this consent would be meaningless if the members could appeal to the secular courts for redress from such decisions. *Watson v. Jones, supra.*

Accordingly, for example, "laying on of hands" may be protected if the party distressed by it was a member of a group that practiced that technique as part of religious worship and thus necessarily was aware of, and might expect that, the touch would occur.

In this case, however, I perceive no consent to the offending conduct. At the time Wolfe began counseling, the minor plaintiff did not have the capacity to consent to improper sexual conduct as a matter of law. *See* W. Keeton, *Prosser & Keeton on Torts*, §18 (5th Ed. 1984); *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518 (1863); *cf. Prince v. Massachusetts, supra.* Nor was there any evidence to suggest that the minor unreasonably subjected himself to the risk of harm.

I do not view *Destefano v. Grabrian, supra,* as altering this relationship between intentional torts and religious practices. Although the court there explained that, because the conduct of the defendant priest was clearly outside of the beliefs and practices of the Catholic church, no First Amendment questions were raised, it did not determine that constitutional protection attaches *anytime* a cleric defendant asserts that his or her conduct is dictated by a sincerely held religious belief or is consistent with the practice of religion.

Hence, as a matter of law, I would hold that if, as here, significant harm is done to a non-consenting minor, the offending acts are not protected by the First Amendment simply because they are committed in the name of religion.

II.

Expert Witnesses

I also do not agree with the majority's conclusion that plaintiffs' expert witnesses impermissibly testified regarding a professional standard of care.

A claim may be maintained against a member of the clergy for breach of fiduciary duty. *See Moses v. Diocese of Colorado,* 863 P.2d 310, 323 (Colo. 1993) ("Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner."); *Destefano v. Grabrian, supra.* Defendants do not dispute that Wolfe was acting as a fiduciary towards plaintiffs.

The duty required by a fiduciary is not tantamount to a "professional standard" of care such as that imposed on a physician or attorney or other specialist. Rather, it imposes an "external standard of a [person] of ordinary prudence in dealing with his own [interests]." *See* Restatement (Second) of Trusts §174, comment a (1959). Such standard of ordinary prudence will apply, for example, in the context of a parent's duty to his or her child, a trust officer's duty to a trust, or partners' duties to each other in the course of partnership business.

Simply stated, a fiduciary's duty is always to take the more prudent course of action. *See In re Petition of First Interstate Bank*, 767 P.2d 792 (Colo. App. 1988). Thus, the testimony of the plaintiffs' witnesses was unquestionably relevant to the question whether Wolfe acted with the ordinary prudence required of a fiduciary when he counseled the minor. Plaintiffs' witnesses gave their opinion that Wolfe's conduct was imprudent and, more particularly, inappropriate, unadvisable, risky, confusing, and harmful.

Nor does the fact the experts also discussed the nature of pastoral counseling transform their opinion into an evaluation of Wolfe's conduct as a "professional standard" of care. The testimony merely placed the issue in context.

Except for Wolfe's use of massage, the content of the counseling sessions was not in issue. Rather, the expert testimony related to the nature of the harm incurred by the minor because of Wolfe's position of trust arising

from the pastoral counseling relationship and the intimate, if not overtly sexual, aspects of the massage technique used. The expert testimony was not a commentary on Wolfe's religion and did not require the jury to consider whether his religious beliefs and practices conformed to a standard of competence within the pastoral community.

Moreover, by using his massage techniques on children, Wolfe disregarded the generally held societal view that children should not be touched in that manner. Thus, his actions were subject to an intentional tort action apart from any standard of professional, clerical, care. *Cf. CJI-Civ.3d* 15:12 (1989) (action against physician for battery based upon treatment or operations without consent is a claim separate from malpractice or lack of informed consent).

Thus, that this conduct also might be characterized by some as violative of a professional standard of care is immaterial and does not abrogate the jury's findings. The question of professional standards of care was not before the jurors, nor were they instructed in any way that would have required them to consider a professional standard of care.

Finally, I do not agree that the jury instruction regarding breach of fiduciary duty is so lacking in guidance as to require reversal. The jury was sufficiently informed that Wolfe's conduct was, by its very nature, imprudent, inappropriate, and carried a risk of harm to the minor, and it was entitled to conclude that it represented a breach of fiduciary duty.

III.

Damages

I also do not agree that the damages awarded by the jury were duplicative or inherently inconsistent.

In the majority's view, the separate jury awards for the breach of fiduciary duty claim and the outrageous conduct claim are duplicative because the jury was authorized to award damages under each alternative claim for the same injury and it is not possible to determine what losses the separate awards were intended to compensate. I do not agree, however, that the different claims merely represent alternative legal theories which seek recovery for the same, indivisible, injury.

The plaintiffs claimed that the minor suffered injuries as result of improper touching amounting to outrageous conduct, and their expert witnesses testified as to the emotional harm which can occur from such touching by a cleric. In addition, the plaintiffs claimed that the minor suffered injuries as a result of a breach of fiduciary duty and their expert witnesses also testified as to the emotional harm which occurs when the position of trust accorded a cleric during a pastoral counseling relationship is abused. Thus, the jury could have determined that additional emotional or other harm occurred because of this breach of trust beyond that which had occurred because of the improper touching.

Moreover, the jury was specifically instructed not to award damages more than once for the same injuries. Each of the verdict forms also directed it to award the damages it found were caused by each defendants' actions under that particular claim for relief and not to

award any damages awarded under any other claim. The jury must be presumed to have understood and followed the court's instructions. *Schmutz v. Bolles,* 800 P.2d 1307 (Colo. 1990).

The majority also concludes that the award against the church on the negligent hiring or supervision claim, because based upon the acts of Wolfe, is duplicative of the award against Wolfe. The majority reasons that the church may not be liable for any additional harm to plaintiff beyond that which is already represented by the awards against Wolfe. Again, I disagree.

The basis of an employer's liability for the negligent supervision or hiring of an unfit employee is entirely separate from the basis of liability under the doctrine of *respondeat superior.* And, in a claim of negligent hiring or supervision, there is an important distinction between the scope of an employer's liability as opposed to the measure of damages which result from the employer's conduct.

In determining liability, an employer is liable for harm "only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm." Restatement (Second) of Agency §213 comment d (1958) (emphasis added). For example, if Wolfe had harmed plaintiffs by hitting them with his car on his way out of the church parking lot after a counseling session, the church could not be liable for negligent hiring or supervision based upon the information they possessed concerning his counseling technique.

However, this criterion for determining if liability should be imposed upon the church for negligently hiring and supervising Wolfe is completely irrelevant to whether damages caused by this negligence may be awarded in addition to those which were directly caused by Wolfe. In that regard, the jury was directed not to award damages already awarded under any other claim for relief and to enter damages of "zero," should it find that plaintiff already had been fully compensated for this harm. Again, we must presume that the jury followed these instructions.

Finally, because neither party objected to the verdict forms, and the issue has not been raised on appeal, I would not dissect the verdicts for possible inconsistencies. *See Wilson v. Board of County Commissioners*, 703 P.2d 1257 (Colo. 1985); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984); *see also Lee's Mobile Wash v. Campbell*, 853 P.2d 1140 (Colo. 1993).

IV.

As to plaintiffs' cross-appeal, I agree with the majority that no basis existed to assert contributory negligence by the minor plaintiff as to the negligent hiring and supervision claim. I would modify the judgment accordingly, and, as modified, I would affirm the judgment.

APPENDIX D

COURT OF APPEALS
STATE OF COLORADO
Court of Appeals Case No. 92CA1929
Trial Court No. 91CV4346

ORDER

DENISE DEBOSE ET AL V BEAR VALLEY CHURCH OF CHRIST ET AL

Upon consideration of the Petitions for Rehearing filed by the Appellant Cross Appellee, Appellant and Appellees Cross Appellants herein, the Opinion is Modified and as Modified, Petitions for Rehearing are DENIED. Davidson, J., would GRANT petition of Plaintiffs-Appellees Cross Appellants. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including February 06, 1995, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Criswell, J.

Taubman, J.

Davidson, J.

DATED: January 05, 1995

[SEAL]

APPENDIX E

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 91 CV 4346, Courtroom 2

TRIAL BRIEF OF DEFENDANT HOMER WOLFE

DENISE DeBOSE, and J. D. B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Defendants.

Defendant Wolfe submits the following Trial Brief. It has been prepared in anticipation of certain issues of fact and law which may arise during the trial. It is subject to modification and elaboration as necessitated by events during the trial.

PROPOSED JURY INSTRUCTIONS

Defendant Wolfe submits 37 tentative jury instructions which may be appropriate, depending on evidence admitted and rulings made by the court.

SIGNIFICANT ISSUES REGARDING PLAINTIFFS' THEORIES OF LIABILITY, AND ADMISSIBILITY OF EVIDENCE

1. BREACH OF FIDUCIARY DUTY BASED ON ANY THEORY THAT DEFENDANT'S CONDUCT FAILED TO CONFORM TO A "STANDARD OF CARE"

The Colorado Supreme Court has held in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), that a claim against a clergyman alleging negligent counseling is a claim of clergy malpractice, which is not recognized as a tort in Colorado or elsewhere. The Supreme Court explained:

> Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or *fiduciary duties*, evil practice, or illegal or immoral conduct. (citation omitted) Since Grabrian is a Catholic priest, the malpractice claim alleged by Edna falls within the realm of "clergy malpractice." (footnote 10) To date, no court has acknowledged the existence of such a tort. (footnote omitted) Since the claim for clergy malpractice is not supported by precedent and raises serious first amendment issues, we have concluded that Edna's second claim for relief was properly dismissed. We do not recognize the claim of "clergy malpractice." 763 P.2d at p. 285. (Emphasis added)

A copy of page 285, 763 P.2d, is attached hereto as Attachment A, to show the text of footnote 10, in which Justice Erickson cites several pertinent law review articles, leading to the conclusion that claims of clergy malpractice, would inherently require the court to determine a standard of care for clergy counseling, which would,

per se, violate the first amendment. (See also a copy of the first amendment, *Constitution Of The United States, Amendments, Article I,* (C.R.S. Vol. 1A, p.19), attached hereto as Attachment B.)

The law review articles cited in footnote 10 of *Destefano, supra,* further elucidate the reasons for dismissal of the "clergy malpractice" claim. From these articles, as well as the comments by Justice Erickson, we discern the following principles relating to first amendment issues:

> (1) if the court undertakes to determine a religious standard of care for pastoral counseling, it invades the free exercise clause;
>
> (2) if the court applies a secular standard to the counseling, it violates the establishment clause;
>
> (3) the only circumstance in which a claim against clergy arising out of counseling is justified is where the court makes a finding that the conduct of the clergyman is "totally preposterous," and completely outside any sincerely held religious belief. See Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power,* 14 Pepperdine L.Rev. 137, 141. In *Destefano, supra,* it was not only acknowledged, but asserted, by both Grabrian and the diocese, that because the church had required a vow of celibacy from Grabrian, and Grabrian had engaged in intercourse with Edna, Grabrian's conduct could not have been based on religious beliefs. *Destefano, supra* at 763 P.2d 284. (Evidently, this was considered to satisfy the "preposterous requirement.)

(4) Civil courts are prohibited from determining whether challenged actions depart from religious doctrine. An authority cited prominently in the law review articles on the basic first amendment requirement of separation of church and state is *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, ___ L.Ed. 2d ___, (1969). That case did not deal with "clergy malpractice" as such, but has been considered by the authors as exemplifying the essential need for caution in restriction civil jurisdiction of church-related matters. (The holding was that a lower court had improperly adjudicated an action involving a transfer of church property.)

A recent decision in *Schmidt v. Bishop, et. al.*, 779 F. Supp. 321 (S.D.N.Y. 1991), confronts issues extremely similar to those of this case. The court, after extensive analysis, dismissed an action against a clergyman and church in which it was claimed that the clergyman had sexually abused a 12-year old during counseling. Portions of the court's opinion follow:

> . . . (I)n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence . . . (A)s with her negligence claim, Ms. Schmidt's fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that engaged in malpractice. (779 F. Supp. at 326).

It would be impossible for a court or a jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent Presbyterian pastor"), following his calling, or practicing his profession within the community. (779 F. Supp. at 327)

This Court . . . regards the unconstitutionality as more than possible. It is real. . . . Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.

It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children. The difficulty is that this Court, and the New York courts whose authority we exercise here, must consider not only this case, but the next case to follow, and the ones after that, before we embrace the newly invented tort of clergy malpractice. This places us clearly on the slippery slope and is an unnecessary

> venture, since existing laws against battery, and the criminal statute against sexual abuse if timely invoked, provide adequate protection for society's interests. Where could we stop? Assume a severely depressed person consults a storefront preacher, unaffiliated with any of the mainstream denominations, but with them, equally protected by the First Amendment. The cleric consults with our hypothetical citizen, reminds him of his slothful life, and that he is a miserable sinner; recommends prayer and fasting and warns of the Day of Judgment. Our depressed person becomes more so, and kills himself and a few more people. These deaths are followed by lawsuits. As to a licensed psychiatrist or social worker, our lay courts should have no trouble adjudicating a claim of professional malpractice on these facts. As to a clergyman, it would be both impossible and unconstitutional to attempt to do so. See Destefano v. Grabrian, 763 P.2d 275 (Colo.1988) (en banc) (dismissing "negligent marital counseling" count in action against defendant priest). 779 F. Supp. at 328

As will be noted from the quoted passages, the court in *Schmidt, supra* cited *Destefano, supra* in support of its ruling that an action for clergy malpractice could not be maintained because of first amendment concerns.

The trial of this case should clearly not encompass any purported determination of a "standard of care", nor alleged breach of any such standard.

There is serious doubt whether this case involves any theory that would not violate the first amendment.

Unlike *Destefano, supra*, the entire emphasis here has been on conduct of defendant Wolfe allegedly not conforming to a "standard of care." Under the circumstances, not only the negligence claim, but all claims against defendant Wolfe, should fail on grounds that evidence would not be admissible to establish a "standard of care."

BLUNK, JOHNSON & JOHNSON

By _____
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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Trial Brief of Defendant Homer Wolfe has been hand-delivered to The Honorable Herbert L. Stern, III, Judge of the District Court, at opening of court on July 13, 1992, and copies handed to Ms. Joyce Seelen and Mr. Neil Quigley, attorneys of record, on July 13, 1992.

APPENDIX F

Defendant Wolfe's Tendered Jury Instructions Nos. 1 through 7 7-24-92

INSTRUCTION NO. 1

In determining whether defendant Homer Wolfe holds a sincerely held religious belief, the jury may not inquire whether his belief is true. I may only inquire whether defendant wolfe holds the belief. It does not matter whether his belief is acceptable to the jury, logical, consistent, or even comprehensible to the jury. All that matters is that he sincerely holds the belief.

91CV4346 Rejected /s/ H.C. Stern 7/27/92

INSTRUCTION NO. 2

If you find that defendant Wolfe's counseling methods used on plaintiff John Debose were a result of his religiouys beliefs, you must find for defendant Wolfe and against the plaintiffs.

APPENDIX G

VOL. 5

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 91-CV-4346, Courtroom 2

REPORTER'S TRANSCRIPT – JULY 8, 1992

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Defendants.

This matter commenced on Wednesday, July 8, 1992, before the HONORABLE HERBERT L. STERN, III, Judge of the Denver District Court.

APPEARANCES

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[Excerpt of Trial Transcript, Vol. 5, page 7, line 3, to page 10, line 12]

THE COURT: I'm not sure exactly what the issue is. We – I intend to ensure consistency with the *Destafano* case, D-e-s-t-a-f-a-n-o, that we don't have this claim turn into a negligent counseling or negligent pastoral counseling claim. Breach of fiduciary duty is a different claim, and all I can do with respect to this motion, in my judgment, is advise you of that perspective, and that's how I perceive the claims. It's my understanding that that's how Plaintiff perceives the claims.

And I'm going to deny Defendant Wolfe's second motion in limine, because it is my belief that a breach of fiduciary duty claim is different than a negligent pastoral counseling claim, and I really don't quite understand the reason for the motion. Do you want to make any further record, Mr. Johnson?

MR. JOHNSON: No. The record is all in what I've submitted, Your Honor.

THE COURT: All right.

MS. SEELEN: Your honor, may I make just a bit of a record?

THE COURT: Yes.

MS. SEELEN: The *Destafano* court included in its duties of – in its fiduciary duties the duty to use reasonable care and skill. they are two dis – negligent counseling and the breach of fiduciary duty are two very different claims; however, there are some elements that could be similar. Just because he provided negligent counseling and – which was prohibited by his fiduciary duty – doesn't mean that the negligent counseling – the failure to use reasonable care and skill, that's specifically set out in *Destafano*, should be prohibited.

THE COURT: Say that again.

MS. SEELEN: Sure. *Destafano* – the court in *Destafano* – and I think it's significant that the court listed in the *Destafano* case – the court in *Destafano* said that one of the duties of the fiduciary is to discharge their duties with reasonable care and skill. The fact that reasonable care and skill would also be required in a basic malpractice case doesn't mean that it is prohibited under the fiduciary duty allegation. There are some – there are some proofs that could be similar.

THE COURT: Well, we'll take it up at trial.

MR. JOHNSON: Your Honor, may I respond? I thought if you would let it go on the brief, that would be satisfactory to me, but maybe I should make an effort to explain our position more fully. In the *Destafano* case, the court dismissed a claim of Edna, which was a claim for

negligent performance of his duties as a marital counselor; and the court identified the fact that the type of negligence that was alleged by the plaintiff included, as the – in the court's own words, it said, Since Grabrian is a Catholic priest, the malpractice claim alleged by Edna falls within the realm of clergy malpractice, and they said, this claim of professional negligence is a claim for malpractice. Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.

Now, I don't think that there's any way to conclude that the Supreme Court intends for a claim to be – to be entertained by the Court against a clergyman for alleged negligent counseling, since they specifically dismissed that claim in the *Destafano* case. They did allow the claim to proceed against the priest and the diocese on the claim that he committed deliberate acts of impropriety, but they dismissed the claim for negligence. And what the Plaintiffs are doing in this case is attempting to avoid the issue by not characterizing the conduct that they claim to be the basis of their cause of action. They're simply saying it's breach of fiduciary duty, and therefore, we can prove any kind of conduct, but –

THE COURT: Your basic position is that this is a clergy malpractice-type case dressed up as a breach of fiduciary duty claim?

MR. JOHNSON: Yes, Your Honor.

THE COURT: All right. I understand what you're saying, and I will read *Destafano* yet again. And I consider myself forewarned on this issue, and I'll have to see how

things develop. My initial reaction is that breach of fiduciary duty is different than clergy malpractice and something of that – to that effect. And if, Ms. Seelen, you and I have a difference of opinion on that once we get into things, so be it.

APPENDIX H

VOL. 6

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 91-CV-4346, Courtroom 2

REPORTER'S TRANSCRIPT – JULY 13, 1992

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Defendants.

This matter commenced on Monday, July 13, 1992, before the HONORABLE HERBERT L. STERN, III, Judge of the Denver District Court.

APPEARANCES

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[Excerpt of Trial Transcript, Vol. 6, page 25, line 9, to page 34, line 23]

THE COURT: All right. I think I'm getting the focus on this a little bit. So your objection is – let me ask you this, Mr. Johnson, would you have an objection if Ms. Seelen's expert said something like, Assuming that these acts occurred, in my professional opinion, this is improper counseling? Do you object to that?

MR. JOHNSON: Yes, I do, Your Honor, for a different reason, however. It relates back to the second motion in limine, and that is increasingly brought into focus by a further analysis of Justice Erickson's decision in *Destafano* and the authorities that he cited.

THE COURT: All right. Well, so why don't you tell me how Plaintiff proves that there was improper conduct here, that there was a breach of fiduciary duty, or that somehow there's an actionable claim? What you're telling me is that an expert can't say that this type of counseling is improper. You're saying that a counselor or an expert can't say that this type of counseling – and all of this

assumes it occurred – you're saying that you can't say it's improper. You can't say it's abusive. Just what exactly, Counsel, do you think somebody can say about this?

MR. JOHNSON: Well, Your Honor, I don't think that this case can be in a civil court. It's –

THE COURT: So we shouldn't even be here is what you're saying?

MR. JOHNSON: That's right.

THE COURT: All right. Well –

MR. JOHNSON: You see, that kind of evidence calls for the Court to make an adjudication of what the standard of care is for pastoral counseling; and that, I think, is really what Justice Erickson was concerned about when he referred to the first amendment problem. He said that – now his decision didn't make it as clear as it might have, because it's my impression that he felt it was not necessary under the circumstances of that case to go into any great lengths of explaining his theory about it, because he was allowing the claim to proceed on another basis.

THE COURT: Well, so what I hear you saying now is that there – in the context of a pastoral counseling relationship, such as apparently existed between the minor Defendant and Homer Wolfe – and I will assume that this existed for the purpose of our discussion, since I don't know the facts of this case – what I hear you saying is that there cannot be a claim under the *Destafano* case for negligent pastoral counseling. And you may be right on that. And you're also saying that there can't be a claim for breach of fiduciary duty based on the *Destafano* case.

MR. JOHNSON: Yes.

THE COURT: And that the only claim anyone – any patient or client could have against a pastoral counselor would be – at least in the nature of – or the facts as alleged by Plaintiff in this case – the only claim would be in the criminal courts.

MR. JOHNSON: That's correct, Your Honor.

THE COURT: All right. So you don't even recognize a possible civil claim by the patient against the pastoral counselor for even civil assault?

MR. JOHNSON: Well, I recognize the possible claim as it was recognized in *Destafano*, Your Honor. If there were such a clear-cut situation as existed in *Destafano*, in which the defendant priest had been required by the church to take a vow of celibacy and then had engaged in intercourse with the woman he was counseling – giving marriage counseling to, that brings that case within the scope of a recognizable action that is sanctioned by the law review articles that Justice Erickson cited on this proposition. They have said that, number one, there cannot be – because of the first amendment and the necessary separation of church and state, the civil court must approach with extreme caution in trying to determine what offenses may or may not do. And Justice Erickson in the footnote, he, in his own language and also in all review articles that he cited, called attention to the fact that when clergymen engage in pastoral counseling, they do obviously touch on some matters that could also be covered by secular counselors, but the court cannot attempt to distinguish between the kinds of counseling activity that are conducted because that would cause a

result that it consists of a judicially determined religious scope.

THE COURT: All right. So what I hear you saying, based on the *Destafano* case, is that – well, is the following: It's okay to have a medical malpractice case against a psychiatrist who would have sex with a patient, and it would be okay to sue that psychiatrist for breach of fiduciary duty as well; same for a psychologist who would have sex with a patient. A priest, based on, *Destafano*, can't be sued for clergy malpractice for the reasons that you just articulated –

MR. JOHNSON: Yes sir.

THE COURT: – but could be sued for breach of fiduciary duty based on *Destafano*.

MR. JOHNSON: He couldn't be sued for breach of fiduciary duty unless the courts make a determination that according to the exposition of this entire matter in the law review articles and in a New York Federal Court decision, which we have cited in the trial brief, which is newly discovered, they can't rely on any theory against a clergyman or the church if it requires the court to determine the scope of pastoral counseling activity, unless the conduct of the defendant was – in the words of authors of the law review articles – was so preposterous as to – I think, what we mean to say is that reasonable people could not disagree about the fact that it was clearly not religious activity.

And I think in *Destafano* Justice Erickson was explaining that because Grabrian had taken a vow of celibacy, which was required of him by the church, and because he

had engaged in intercourse with Mrs. Destafano when he was giving marriage counseling, that they – in-effect, it would be preposterous to consider that as having been church-related activity. And, in fact, Justice Erickson stressed the circumstance that both Grabrian and the diocese acknowledged, and even asserted, that his conduct had nothing to do with the pastoral counseling or duties for the church. And therefore I think that is the reason that he allowed the claim against the priest in that case and against the church, to the extent that it was allowable against the priest. But I think that it might need a further decision from the Supreme Court as to how far they would extend the authority of a civil court to delve into the proper scope of pastoral counseling, as such. But it was quite clearly delineated in *Destafano* that at least the claim for negligence could not be pursued because it constituted clergy malpractice, which is not a recognizable cause of action.

THE COURT: We don't have any disagreement on that.

MR. JOHNSON: Well, if you – if you have no proof of a – if there cannot be proof of a standard of care for pastoral counseling, which is what these authorities say that Justice Erickson cited, then I don't think that there's any logical basis for –

THE COURT: Well, we're going to have to – I think I understand what you're saying, and I think I basically disagree with you, although I recognize some of the fine lines you are seeking to draw and/or highlight. What I hear you saying is that you can't sue somebody in the civil courts who is involved in pastoral counseling, but

you can sue a doctor, a psychologist, or a clergyman. And I have to tell you in all candor I have a little trouble with that. While I understand what you're saying, and I'll give this some more thought, but I am not going to, in essence, throw out the Plaintiffs' case at this point.

MR. JOHNSON: Well, Your Honor, I can understand the Court's approach of deliberation, but I do think that if the Court would refer to that decision by the U.S. Court in New York, which we have included – or we have quoted some passages from it in our trial brief, and – has the trial brief been made a part of the file, Your Honor?

THE COURT: Well, it will be, but that was yet another document that was not filed in accordance with proper procedures, so we're handling that. Don't worry, your record will be protected on that. I haven't read it. I got it shortly before I went out on the bench; and I, frankly, don't know when I'm going to get a chance to read it, but I promise you I will read it before this case is over.

MR. JOHNSON: Well, any opinions that are given about what the Defendant should or should not have done are necessarily determinations – or opinions of what he should have done, which is – which involves the Court in determining the standard of care for pastoral counseling, and that seems to be very clearly circumscribed – or proscribed.

THE COURT: Well, it may be what we're dealing with here is semantics, and it may not be. I think that if we are talking about a standard of care for pastoral counselors; that's one thing. If we are taking about, in a

more generic sense, what is and what is not appropriate counseling, then it may be something entirely different.

To use an extreme example, if someone goes to a pastoral counselor for some mental and emotional assistance, therapy, whatever you want to call it, and the counselor determines that the best way to treat the patient is through whipping the person, and therefore, does so, it seems to me that by just about any standard that would be viewed as inappropriate therapy. And what I hear you saying is maybe in the case of a psychiatrist, it would be; maybe in the case of a psychologist, it would be; but there are recognized courses of action for dealing with that – there are recognized and established standards of care – maybe in the context of a particular religion that would be inappropriate, and a breach of fiduciary duty claim could flow, but that you are trying to carve out a separate and distinct category of pastoral counseling that – saying, in the context of pastoral counseling this may be entirely appropriate. That's where I'm having some trouble. And that's, obviously, an extreme example. I don't know the facts of this case, but my gut tells me that there is a line somewhere in the realm of pastoral counseling that if crossed would amount to a breach of fiduciary duty.

MR. JOHNSON: The line did – the determination of the line involves the Court making a ruling as to what a pastoral counselor can or cannot do. And, Your Honor, I'm increasingly convinced that the authorities, including those that were cited and relied on by Justice Erickson, really do not authorize a civil court to do that, that the only reason that the claim was allowed to go forward against the priest in the *Destafano* case was that he had

taken the vow of celibacy and had intercourse with the plaintiff, which the court, in effect, said ruled out any possibility that it could have been clerical activity. And that was, I think, the basis of allowing that thing to go forward, which we do – we are quite serious about the idea, Your Honor, that a civil court, any civil court, and I think the United States Supreme Court takes this view as well. We have cited a case from the United States Supreme Court, too, which is – which bears scrutiny with the application of this case, although it did not happen to involve any pastoral counseling activity. But we do – we do feel that when the Court ventures into the area of making an adjudication of what is or is not proper pastoral counseling, it has gone beyond the permissible scope of civil jurisdiction for matters of this kind because of the First Amendment.

THE COURT: Okay. Well, I'll certainly allow you to make your record. I certainly agree with you that the *Destafano* case only goes so far and doesn't address, necessarily, at least, all of the issues that we've got. I've dealt with the *Destafano* case before, and sooner or later I'm – I hope that some of these issues will be addressed by the Court of Appeals of Colorado and maybe also the Colorado Supreme Court, because, frankly, I think they're very interesting issues and they're troubling for all of us. So I'll certainly permit you to make your record, and –

MR. JOHNSON: I appreciate that, Your Honor. May I say, Your Honor, at the last appearance, last Wednesday, Ms. Seelen said that before beginning the trial she would tell the Court and the Defense counsel exactly what she intends to say about other acts in her opening, and I

wonder if she could do that now so that we could be aware of it and maybe make a record on that as well.

APPENDIX I

VOL. 9

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 91-CV-4346, Courtroom 2

REPORTER'S TRANSCRIPT - JULY 16, 1992

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Defendants.

This matter commenced on Thursday, July 16, 1992, before the HONORABLE HERBERT L. STERN, III, Judge of the Denver District Court and a jury of six.

APPEARANCES

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[Excerpt of Trial Transcript, Vol. 9, page 43, line 1, to page 45, line 5]

MR. JOHNSON: All right, sir. It does seem clear to us, Your Honor, that in this case we do not have the circumstances that existed in *Destafano* which enabled Justice Erickson to make a finding, in effect, as a matter of law, that there was no religious activity involved in the acts of defendant Grabrian. In this case, the Defendant Wolfe does have a religious belief that there was a religious basis for all of these activities, and for the court – this Court or any court, any civil court, to enter into the entertainment of jurisdiction over a battle of opinions between different religious personnel as to how religious counseling should be conducted, is really not authorized by *Destafano*.

But much more to the point, by the various authorities that were cited by Justice Erickson in his decision, and even the comments of Justice Erickson in footnote 10, where he does cite those authorities – or the proposition of the need to dismiss any claim that was based on

negligence. And in that case the reason that negligence was singled out as the claim to be dismissed was that it was the negligence claim that required the court to establish a standard of care. And Justice Erickson said that whenever the court even thinks about establishing a standard of care for the exercise of religion, it is – it has gone beyond the extent of its authority because of the limitation imposed by the First Amendment.

The Law Review articles and other authorities that were cited by Justice Erickson do a much more thorough job of explaining the reasons for all this. But even Justice Erickson's decisions and comments in the footnote make it quite clear that whenever a person has religious reasons for his activity, even though it will inevitably occur that some of those activities may also involve matters that are not intrinsically religious, the court cannot enter into the exercise of value judgments about where the religious activity stops and where the other activity starts. And, therefore, that was what Justice Erickson meant when he said it would raise serious or grave, or whatever adjective he used, questions of First Amendment concerns, and he was able to essentially stop discussing it at that point, other than just dismissing the claim for the basic, practical reason that he was allowing the claim to go forward on the other basis that he had concluded, as a matter of law, that it could not have been a religious belief that prompted Grabrian's activities in having intercourse with plaintiff Edna Destafano, who was in marital counseling with him, after having taken a vow of celibacy which was required by his church.

Now, having said that, Your Honor, I do think that the secular – the decisions that the Court is relying on

about various kinds of secular defendants basically become irrelevant to the issues to be decided in this case.

[Excerpt of Trial Transcript, Vol. 9, page 53, line 21, to page 60, line 6]

THE COURT: If I understand your position, Mr. Johnson and Mr. Quigley, on the jurisdictional issue, and based on the *Destafano v. Grabrian* case, 763 P.2d 275, you basically feel that the Colorado Supreme Court, in essence, ruled that there's no cause of action against someone such as Homer Wolfe for any of his counseling conduct since such counseling conduct was performed within the confines and, arguably, under the purview of the church; is that correct?

MR. JOHNSON: That's correct, Your Honor, and for the further reason that this case does not involve any circumstance comparable to that existing in *Destafano* which would enable the Court to say, as a matter of law, that the activity could not be religiously based.

THE COURT: So, in essence, the level of alleged sexual misconduct in this case is substantially less than the level of alleged sexual his conduct in the *Destafano* case?

MR JOHNSON: Well, I don't think in the *Destafano* case that the court was called on to make any decision whether an activity – whether the extent of activity was such as to cause it to stop being religious. The point was that the priest had taken a vow of celibacy, and there was admitted intercourse with the woman who was in marriage counseling; and therefore, I think that the court

said, as a matter of law, that it could not be a religious activity. But we don't have that kind of activity here.

THE COURT: Do you feel – either of you – that given the facts of this case, as alleged by the Plaintiff, that, as a matter of law, there can be no breach of fiduciary duty claim and, as a matter of law, there can be no outrageous conduct claim?

MR. JOHNSON: Yes.

MR. QUIGLEY: Yes.

MR. JOHNSON: Those require determination of a standard of care which the Court is really not authorized to do.

THE COURT: So if that's the case, how do you reconcile the fact in *Destafano* that they allowed – "they" meaning the Supreme Court of Colorado – allowed breach of fiduciary duty claims to go forward and outrageous conduct claims to go forward?

MR. JOHNSON: Well, because in that case they made a determination, as a matter of law, that the activity could not have had a religious basis because of the vow of celibacy and the admitted intercourse.

THE COURT: So it would be your belief that I must make a finding in this case that Homer Wolfe's conduct was not, as a matter of law, and could not, as a matter of law, have any religious basis?

MR. JOHNSON: Yes, sir.

THE COURT: Okay.

MR. JOHNSON: In order to do that you'd have to determine what is the extent of activity that can be conducted with a religious basis, and I think at that point the court, the appellate decisions, and the Law Review articles say that you can't do that.

THE COURT: What about a situation where someone utilizes his or her position as an official in a church – let's say a minister – solely for the purpose of satisfying the urges of a pedophiliac? So that – are you saying, in essence, based on the *Destafano* case, that if a Church was to hire, totally innocently, after a careful background check and all of that, a pedophiliac, and that that person became a priest – or was a priest when hired, and that that priest utilized his position to take advantage of children sexually, that under no circumstances is that an actionable claim under Colorado law?

MR. JOHNSON: I believe that that is what the result would be, Your Honor.

THE COURT: And, Mr. Quigley, do you agree with that?

MR. QUIGLEY: The reason I'm hesitating, I'm trying to think of the *Destafano* case, whether there's any similar-type happenings in that pedophilia situation that you couldn't argue it was partly religious. I don't think that they could separate the pedophile activities and that it could be held, as a matter of law, that wasn't a religious activity on the part of the minister doing it.

THE COURT: So as some point it requires a judicial – or it may require a judicial determination as to what the

proper or appropriate purview of religious activity is versus nonreligious activity?

MR. QUIGLEY: I think if it's clearly nonreligious, the basis upon which you're proceeding, then, it – as the *Destafano* case indicates, there was a clear basis that had nothing to do with religion. I think a pedophile situation, if it was truly proven he was a pedophile and that everything he did was directed towards that, I think that could be the same as the *Destafano* case. It wouldn't be religious. It's clearly separated, but we don't have that here.

THE COURT: Well, don't you think the minister might say that – as an example, the minister or the priest might say that "I believe this was in the best interests of the child parishioner. I believed I was helping this person. I believe I was doing this in accordance with biblical law or church law"? – perhaps, misguidedly, from our perspective, but these are troubling issues.

MR. JOHNSON: Your Honor, my associate, Jim Thornburn, has been working quite a lot on researching that issue, and I wonder if the Court would be willing to let him explain something?

THE COURT: Sure. I need to – this is troubling stuff for all of us, and it may be troubling – sooner or later it's going to be something that's going to trouble the Court of Appeals and the Supreme Court. And I had always perceived the *Destafano* case to stand for the proposition that there is no such thing as clergy malpractice. And while I know you all have some dispute about whether that's, in fact, still a claim in this case or not, it's not a claim that's been filed in this case, as far as I'm concerned, and certainly nothing along those lines, in my judgment, is

going to the jury; but I had always sensed – or interpreted *Destafano* to recognize a breach of fiduciary duty claim by a church or a minister and to recognize an outrageous conduct claim as viable, potentially, under Colorado law as well. I will review that case yet again. I can't tell you how many times I have read it.

MR. JOHNSON: We should have a competition in the Colorado bar and bench to see who has read it the most times.

THE COURT: Well, I will tell you that I have had enough discussions with people – with enough attorneys about this case that there's very definitely a difference of opinion as to what it means and what its implications are, and this is not the first time I've been in the middle of a trial trying to struggle with issues raised by plaintiff's and defendant's counsel.

MR. JOHNSON: Just one final point. And would the Court – are you thinking of recessing for lunch and then resuming this afternoon? That would be fine, but I do think that in the discussion of clergy malpractice, the examples that are given there by Justice Erickson do definitely include one – the forms of clergy malpractice as being breach of a fiduciary duty. So the point is here that breach of fiduciary duty is really not a tort. It is – it has to be based on some kind of conduct, and that conduct has to be characterized in some way as with reference to a standard of care. Breach of fiduciary duty cannot exist unless there is a standard of care established; and that, I think, is why it becomes confusing to say, well, this is not – this is not a clergy malpractice; this is a breach of fiduciary duty. I think that Justice Erickson contemplates

a breach of fiduciary duty as being a breach of malpractice, unless it involves the kind of case where Grabrian's activities made it possible for the court to determine, as a matter of law, that the activity could not have been – have had a religious basis.

THE COURT: I don't think I agree with you that a breach of fiduciary of duty requires standard of care evidence and the like, but that's something we're going to have to discuss a little further. And we've already discussed it some earlier in the case, and I recognize that is your position.

APPENDIX J

VOL. 11

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 91-CV-4346, Courtroom 2

REPORTER'S TRANSCRIPT – JULY 20, 1992

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Defendants.

This matter commenced on Monday, July 20, 1992, before the HONORABLE HERBERT L. STERN, III, Judge of the Denver District Court and a jury of six.

APPEARANCES

FOR THE PLAINTIFFS: JOYCE SEELEN, ESQ.
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FOR THE DEFENDANT BEAR VALLEY: NEIL QUIGLEY, ESQ.
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FOR THE DEFENDANT HOMER WOLFE: GEORGE E. JOHNSON, ESQ.
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[Excerpt of Trial Transcript, Vol. 11, page 102, line 25, to page 103, line 18]

THE COURT: Let the record reflect that we're in chambers and that the Plaintiffs have rested their case.

Mr. Quigley, do you have any motion?

MR. QUIGLEY: Yes, Your Honor, and I'll try to be brief. I think most of these things we've covered before.

First of all, we move for dismissal on behalf of the Bear Valley Church of Christ the entire case of the Plaintiffs. This case is based on the U.S. Constitution and the First Amendment, freedom of religion. It is evident at this point in time in the case that the case is filed with decisions that the Court – or the jury is going to make on the Church's operation of hiring and supervising its personnel, and in fact, they're going to make a determination as to whether the conduct was or wasn't sexual abuse. I think all of these things are clearly limited by the Constitution. There are cases that have been decided that say that you just can't – you just can't invade the church in that way to that extent.

[Excerpt of Trial Transcript, Vol. 11, page 105, line 17, to page 106, line 5]

THE COURT: Mr. Seelen, any response – oh, wait a minute. Mr. Johnson, I assume you join in that – all of those?

MR. JOHNSON: Well, I do join in all of those, with the exception of one based on vicarious liability because of the inapplicability of it. I do – I would like to amplify on my own theories regarding the motions, but maybe the Court would like to just have Ms. Seelen comment on Mr. Quigley's.

THE COURT: Go ahead, Ms. Seelen.

MS. SEELEN: Your Honor, first of all, as to the First Amendment question, none of the questions that we're asking this jury to resolve have anything do with religious belief or doctrine.

[Excerpt of Trial Transcript, Vol. 11, page 108, line 22, to page 110, line 5]

MR. JOHNSON: All right. Thank you. I would just like to state our position on some of these grounds. And, first of all, referring to the First Amendment issues, I won't go into this to the length we did before the beginning of the trial, but I think the fact remains that the fact that Justice Erickson's decision in *Destafano* did allow the case to continue as against Grabrian on the theory of breach of fiduciary duty is not analogous to this case, because the conduct of Grabrian was clearly not even arguably in the contemplation of any religious activity.

And the difference here is that Defendant Wolfe definitely says that he was doing pastoral counseling, and there's not a circumstance in this case that provides any convenient way, such as in *Destafano*, to clearly find that he was not religiously motivated in his counseling. And Justice Erickson, in his decision, did clearly advert to the proposition that when pastoral counseling occurs, it may very well, and often does, include certain activities or subjects that are not strictly clerical, but that the court cannot venture into the effort of determining where the religious activity can be subdivided and separated out from incidental community activity in the counseling.

So we do think that the First Amendment is very much at issue in this case. And the fact that in order to prove a case in here against Defendant Wolfe, it is necessary for the Court to determine a standard of care for pastoral counseling in which the evidence has been admitted on that subject. But we still contend that that is outside the jurisdiction of the civil court, and that, therefore, this case should be dismissed because there is no clear way, as it was in *Destafano*, for the Court to make a finding that this could not have been religiously based activity.

[Excerpt of Trial Transcript, Vol. 11, page 114, line 4, to page 119, line 5]

THE COURT: All right. Plaintiff confesses the motion for a directed verdict by Defendant Wolfe as to the outrageous conduct claim asserted by Denise DeBose. As to the other claims – and therefore, that claim will be dismissed and not presented to the jury.

As to the other claims, under the standard that's applicable at this stage of the case – in a nutshell, I believe it's under Rule 50, all reasonable inferences go to the Plaintiff at this stage, and I think that there is ample evidence by which a jury could find that the conduct of Mr. Wolfe was outrageous and that Mr. Wolfe had breached a fiduciary duty. Outrageous is to John and breach of fiduciary duty is to Denise and John, and I think there's an adequate basis on which a jury could find punitive damages, given the benefits that Plaintiff is entitled to.

Similarly, with respect to the Church's claims, I think that there's adequate evidence so that the claims against the Church can go forward. I am concerned, and I think we are going to have some difficulty, perhaps, with instructions that both Defendants numerous times in this case have talked about, how this is a clergy malpractice case or a negligent pastoral counseling case. And now, Mr. Johnson, you've inflicted the concept of bystander recovery and zone of danger and Denise's claims being derivative of John's. Those concepts, at least to my mind, fall within the purview and legal theory of negligent infliction of emotional distress, which is not a claim in this case. If it was a claim in this case, you might be correct. We've go a breach of fiduciary duty case, an outrageous conduct case, a vicarious liability, in essence, based on actions of the Church constituting ratification. That's what the jury is going to get.

It is an interesting legal exercise and maybe something that the Court of Appeals or the Supreme Court could take up further, whether breach of fiduciary duty, in essence, is a negligent standard, at least in a case such

as this. But the issue that the jury is going to be called upon to decide is whether the Defendants breached a fiduciary duty and whether their conduct constitutes outrageous conduct, and the jury will be advised as to the elements of those claims. They're not going to be advised on anything relating to the negligence.

And I want to make sure that the record is clear that I am endeavoring, at least, to not have this case be negligence; and I don't think anyone has even mentioned negligence at this trial, at least in terms of testimony. And virtually every reference to negligence has been raised by Mr. Quigley or Mr. Johnson. And I don't know if it's a question of your perceiving the case differently than me, or if you're trying to turn it into a negligent pastoral counseling case. I would view such a claim as being prohibited by the *Destafano* case.

I do think that in the context of breach of fiduciary duty, you do arguably flirt with the concept that this might seem to bleed over into that area, but the testimony is that the counseling relationship is a – particularly with a member of the church, is a very special relationship for a variety of reasons. And it seems to me that the case can appropriately go forward on fiduciary – principally on breach of fiduciary duty grounds and outrageous conduct grounds.

The vicarious liability, by way of ratification, is something the jury will be instructed on and is, to my mind, a factual determination. I do not think we've gotten into church doctrine or even, for that matter, church practices. I suppose it's possible that the Elders during the defense case could testify that notwithstanding their seeming lack

of supervision of Homer Wolfe, based on the evidence I've seen so far, that it is their view, and was their view, that all of Mr. Wolfe's alleged counseling or asserted therapeutic technique or methodology was based on religious teachings and doctrine. There is virtually no evidence to support that at this point, other than Mr. Wolfe making some statement that he felt his efforts were based upon – if my memory serves me correctly, he said something like based upon the Scriptures or based upon the Bible or based upon teachings in the Bible. And if that's where the Defense is coming from, I will certainly be interested to hear the Defendants' religious or biblical justification for the alleged conduct of Mr. Wolfe. Certainly, if that evidence comes in, it is going to present a perplexing issue, if not for me, certainly for the Court of Appeals and the Supreme Court, at some point, whether it be this case or some other case.

So the motion for directed verdict by the Bear Valley Church of Christ, joined in by Homer Wolfe, as well as the additional matters raised by Homer Wolfe in his motion for a directed verdict, rather, will be denied. Anything else at this time?

MS. SEELEN: No, Your Honor.

MR. JOHNSON: The only thing is, Your Honor, if I have said anything during the trial that used the word "negligence," it has not been my intention to do so.

THE COURT: I don't think you've done it in open court. We've had repeated discussions outside the presence of the jury, both before and during trial, and I understand your position to be – and you can correct me

if I'm wrong; and I think you subscribed to that viewpoint also, Mr. Quigley, although it seems more applicable to Mr. Wolfe – and your position is that you really can't have a breach of fiduciary duty claim without, in essence, having a negligent pastoral counseling claim, that they're, essentially, two horses of the same color, or two sides of the same coin, if you will, and that that's violative of the First Amendment and violative of the precedent of *Destafano*.

MR. JOHNSON: Well, that may be, you know. That may be a correct analysis of my position, although, I see it more as a – that our theme has been that breach of fiduciary duty necessarily, at least as it applies to this case, involves establishing a standard of care which was either negligently or purposely violated. And so I can't – I'm not sure that I would agree that that is necessarily a negligence test. There is a standard of care test, because if – in other words, if you have to assume that there has been a duty established which has been violated, then that duty, in essence, consists of whatever standard of care is found to be applicable, I think, as to whether the conduct which is violative of it is negligent or purposeful.

THE COURT: All I'm trying to say is my conception of a breach of fiduciary duty case does not involve issues of standard of care.

MR. JOHNSON: Okay.

THE COURT: And we can discuss this further when we get to instructions. Anything further?

APPENDIX K

VOL. 16

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 91-CV-4346, Courtroom 2

REPORTER'S TRANSCRIPT – JULY 27, 1992

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Defendants.

This matter commenced on Monday, July 27, 1992, before the HONORABLE HERBERT L. STERN, III, Judge of the Denver District Court and jury of six.

APPEARANCES

FOR THE PLAINTIFFS:	JOYCE SEELEN, ESQ. Holland, Seelen & Pagliuca One United Bank Center 1700 Lincoln Street, Suite 2530 Denver, Colorado 80203
FOR THE DEFENDANT BEAR VALLEY:	NEIL QUIGLEY, ESQ. Quigley & Bruce 950 South Cherry Street Denver, Colorado 80222

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[Excerpt of Trial Transcript, Vol. 16, page 3, line 14, to page 4, line 8]

THE COURT: All right. Mr. Quigley, why don't we start with you. It's my understanding you wanted to make a motion for a directed verdict.

MR. QUIGLEY: Yes, Your Honor.

THE COURT: Go ahead.

MR. QUIGLEY: I'm going to move for the directed verdict first on the First Amendment to the U.S. Constitution, because I feel that bars any lawsuit from continuing. As we've indicated to the Court in earlier arguments throughout the case, I think allowing this case to be tried and go to a jury clearly is invading the level of the church as to its relationship with its congregation membership. It's allowing them to examine their manner of hiring and supervision. It's allowing them to deal with the manner in which pastoral counseling is conducted within their church. I think all of this is against the very essence of what the First Amendment of the U.S. Constitution is about. This is not a case where it is totally without argument, with the – that the conduct involved is outside the scope of the religion.

[Excerpt of Trial Transcript, Vol. 16, page 6, lines 14-20]

And I'd also, as to the jury instructions in the case, I would object to the jury instructions in total based on the motions for directed verdict and in any manner in which they conflict with those motions for directed verdict. I would also adopt any arguments made by the co-defendant concerning the jury instructions and for directed verdicts.

[Excerpt of Trial Transcript, Vol. 16, page 7, line 17, to page 9, line 5]

MR. JOHNSON: Thank you, Your Honor. Defendant Homer Wolfe moves for a directed verdict on grounds that this Court lacks jurisdiction to conduct a trial which requires a determination of a standard of conduct for the practice of religion, which is, we believe, what has occurred here. There are ample authorities to the effect that the enforcement of tort liability is a state action, and it is clear in this case that Homer Wolfe's counseling was the practice of religion, and it has been made clear in the *Destafano* case and in the authorities cited in *Destafano* that when counseling is conducted as part of a minister's religious activity, the mere fact that it may also include some activities which could or might be performed by a secular counselor, does not justify an action by the civil court in separating out or attempting to separate out the activities as between religious and secular aspects. It is definitely an infringement of the exercise of the First Amendment of the U.S. Constitution.

In the *Destafano* case there was a clear enough situation so that Justice Erickson and the Supreme Court

found, in effect, that the balancing test clearly justified state action with respect to the conduct of defendant Grabrian; and it was, in effect, held that it was not even arguable that Grabrian's conduct was religiously based, because he had taken a vow of celibacy. And it was acknowledged that he had intercourse with Mrs. Destafano, who was seeing him for marital counseling. And, in fact, both defendant Grabrian and the defendant diocese acknowledged and admitted that his activity could not be discerned to be religious based, which distinguishes it from this case.

We also move for a directed verdict on grounds that there was no breach of any fiduciary duty to Denise DeBose, and you have – in view of the fact that her only complaint was based on something that she claims happened to John DeBose. And there was no complaint by Denise, as far as I heard in the evidence, that her claim was based in any way on anything that happened in Homer's counseling of her, as such.

[Excerpt of Trial Transcript, Vol. 16, page 10, line 11, to page 12, line 5]

We adopt any motions and arguments made by the co-defendant Bear Valley Church, and we also assert that the two-year limitation of actions should be applicable to this case under the theory that Defendant Homer Wolfe was practicing therapy which is under a separate section of the same two-year limitation.

Those are our motions, Your honor.

THE COURT: All right. Ms. Seelen, before I ask for your response, I just want to ask Mr. Johnson a couple of questions.

MR. JOHNSON: Yes, sir.

THE COURT: As to the issue of Mr. Wolfe assertedly practicing religion in these counseling sessions, I believe the evidence is that he would conduct a prayer at the end of each counseling session. My recollection is that perhaps someone testified that occasionally – maybe it was a routine as well – that he did so at the beginning of each counseling session. My question to you is whether you think the existence of prayer at the beginning or at the end, or at both, in a counseling session, such as conducted by Mr. Wolfe, impacts the issue that you're raising as to the practice of religion throughout the entire session. I guess my question in a nutshell is, does the existence of prayer at the beginning and the end, or both, impact your argument at all? Or if the testimony was that there were no prayers, would you have the same argument? Do you understand my – do you understand my question?

MR. JOHNSON: Well, I think I do, Your Honor. And my response to that is that I think that the fact that prayers were part of the sessions is a significant factor, but I don't think it's the only factor. It has been clear from the testimony that Defendant Wolfe and, in fact, from other testimony, that he had definitely had religious – a religious basis for his counseling. He testified as to what constitutes the difference between secular counseling and pastoral, or Christian or ministerial counseling, in that pastoral counseling, which he practices, attempts to bring

the person into contact with God or to improve his communication with God in order to receive help; whereas, secular counseling is performed without God as a concept. Therefore, it seems to me that everything about his counseling was religiously based, and that the fact that prayers were said, I think, is a reinforcement but would not be the only factor.

[Excerpt of Trial Transcript, Vol. 16, page 13, line 17, to page 15, line 1]

MS. SEELEN: The court in *Destafano* specifically addressed the threshold question whether the Court would grant immunity to clergy for their misdeeds, and the court specifically said, no, there is no immunity in Colorado for clergy for their misdeeds. They went on specifically to say that there is a fiduciary duty, and under that a fiduciary duty can be breached, and I think that in that particular specific the *Destafano* court was pretty clear.

I agree that there are other specifics of the *Destafano* court that we are going to need the Court to – we're going to need more guidance. But in this case, Homer Wolfe said that he looked at the genitals of children to check circumcisions. There's no indication that that is a religious right. He indicated that he does massaging of children. There's no indication that that's a religious right. This case I think, is clearly within the fiduciary duty breach suggested by *Destafano*.

A question that I had when we asked Mr. Carter to specifically say whether or not this was a religious right, the Court said, Ms. Seelen, you can't get into that because

you didn't endorse him as an expert. And I think it's clear from *Destafano* that we can't endorse experts on religious rights because that's – that's – that's – into clergy malpractice.

So how do you defeat someone like Homer Wolfe who might say, This is part of a religious right? – although, I don't think that he did in this case. I think that the things that are most egregious are he didn't, maybe – I'm making a record, and the Supreme Court can look at it and tell us – and tell us how you defeat someone saying that's a religious right when we can't endorse a expert because of clergy malpractice. I don't think that we have to get into the case, because he did say the things – that things that hurt children were part of the religious right.

[Excerpt of Trial Transcript, Vol. 16, page 23, line 13, to page 24, line 8]

THE COURT: Mr. Johnson?

MR. JOHNSON: Yes, Your Honor. I did not make any objections to the instructions earlier. I thought we were asked to make our motions at that time. But I would like to now object to the instructions in general, to the extent that they encompass the concept of breach of a fiduciary duty for Denise DeBose. And it would be our position that her claims are for things that she claims occurred to John DeBose and that it's our reading of the previous authorities that breach – that there's not a fiduciary duty to Denise DeBose in connection with what does occur with John DeBose.

In the *Destafano* case, the court found that fiduciary duty because the Destafanos had gone to Grabrian for marital counseling; and the court, I think, made it quite clear that it was – that the commitment was to do things only that would improve the marriage, and that Grabrian having intercourse with Mrs. Destafano was not done in furtherance of the marriage. I believe that was why the court had no difficulty finding a fiduciary duty to Mr. Destafano under that circumstance.

APPENDIX L

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 91 CV 4346, Courtroom 2

DEFENDANT WOLFE'S POST-TRIAL MOTIONS

DENISE DeBOSE, and J. D. B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Defendants.

Defendant Wolfe submits the following motions for post-trial relief under authority of C.R.C.P. 59:

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

1. MOTION FOR J.N.O.V. REGARDING FIRST AMENDMENT

Defendant Wolfe moves the court to enter judgment in his favor and against the plaintiffs on all issues, notwithstanding the verdict returned by the jury, on the basis that the claims asserted against him in this action are precluded by the religion clauses of the first amendment to the *Constitution of the United States of America*, C.R.S. Vol. 1A, p. xx, as more fully explained below:

SUMMARY OF THE ISSUES

Homer Wolfe was employed by the Bear Valley Church of Christ as a minister from 1981 through May of 1988. His duties included counseling for members of Bear Valley, for which there was no charge to counselees. Mr. Wolfe testified about the difference between secular counseling (without God) and pastoral counseling (with God), the latter being his method of counseling. As explained by Mr. Wolfe, his only way of helping counselees is to help them communicate with God, which is sometimes made easier for them by massage to help them relax.

Denise DeBose, and John DeBose through his next friend, Denise DeBose, brought this action against Homer Wolfe and Bear Valley Church of Christ, claiming that Homer was a pastoral counselor of John DeBose, and used improper counseling methods in his counseling sessions. These methods, they claim, included massaging of John DeBose. The plaintiffs' claims for relief include breach of fiduciary duty and outrageous conduct as to Homer Wolfe, and breach of fiduciary duty, negligent hiring and supervision, vicarious liability, and outrageous conduct on the part of Bear Valley Church of Christ. The essence of the plaintiffs' theory of liability is that Homer Wolfe used methods in counseling which a reasonable and prudent pastoral counselor would not have used, as a result of which the plaintiffs sustained damages.

Defendant Wolfe admits that he was a pastoral counselor of John DeBose, which is thus undisputed, being alleged by plaintiffs and admitted by defendant Wolfe. Defendant Wolfe asserts that the first amendment of the

Constitution of the United States of America, supra, precludes exercise by a civil court of jurisdiction over the claims of plaintiffs against him, because the court would have to adjudicate what is or is not proper pastoral counseling, which would violate the free exercise and establishment clauses of the amendment.

ARGUMENT

I. THE COURT INCORRECTLY APPLIED *DESTEFANO V. GRABRIAN* IN THIS CASE

A. *Destefano v. Grabrian* Only Allows an Action Against Clergy Where the First Amendment Is Not Implicated

During the trial of this matter, the court concluded that *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988), which allowed a claim against a priest and diocese for breach of fiduciary duty, was the controlling precedent and should be applied to the trial of this case. That claim did not involve the adjudication of religious conduct, because both the priest and the diocese acknowledged that the priest's conduct was not, and could not have been religious. However, *Destefano* also affirmed the dismissal of a separate claim which it identified as "clergy malpractice," noting that if religious activity were involved, serious first amendment issues would be involved. In explaining why one claim was allowed to go forward because it did not require adjudication of religious conduct, Justice Erickson in *Destefano* stated:

> If the alleged conduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion,

we would have to resolve a difficult first amendment issue. This, however, is not the case. It has not been asserted that Grabrian's conduct falls within the practices or beliefs of the Catholic church. Grabrian's and the diocese's brief states that "every Catholic is well aware of the vow of celibacy required of a priest at the time of his ordination." The brief also points out that "sexual involvement by a priest has been held to be per se outside the scope of his employment." The brief recognizes and admits that sexual activity by a priest is fundamentally antithetical to Catholic doctrine. As such, the conduct upon which Edna's crossclaim is premised is, by definition, not an expression of a sincerely held religious belief.

Members of the clergy cannot, in all circumstances, use the shield of the first amendment as protection and as a basis for immunity from civil suit. When the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of his religion, he cannot avail himself of the protection afforded by the first amendment. (Footnote omitted.) (763 P.2d at 284.)

It is clear that the acknowledgment by both Grabrian and the diocese that his conduct was outside the beliefs and doctrine of his religion, provided the basis for finding the Destefanos' claims for breach of fiduciary duty not precluded by the first amendment.

This should not be taken, however, as an indication that the court may inquire as to whether conduct of a pastoral counselor is, in fact, religious conduct, where he, unlike Grabrian, does not acknowledge the conduct to be non-religious. Since the determination would necessarily

require the court to define religious conduct, such inquiry is prohibited by the first amendment. See *Frazee v. Ill. Dept. of Emp. Sec.*, 489 U.S. 829, 109 S.Ct. 1514 (1989). Justice Erickson said in *Destefano, supra*, that plaintiff Edna's second claim, which would have required establishing a standard of conduct for (pastoral) counseling, was a claim of clergy malpractice, which was properly dismissed by the trial court. He discussed the inherent difficulty of attempting to define a limit of religious activity in pastoral counseling, beyond which the first amendment would not apply. He discusses the concept in a note as follows:

> At least one commentator has argued that the cause of action should be labeled "spiritual counseling malpractice." The dispute, in such an action, "focuses on counseling rendered by a member of the clergy in meeting the spiritual, emotional, and religious needs of the counselee." Ericsson, *Clergymen Malpractice: Ramifications of a New Theory*, 16 Val.U.L.Rev. 163, 166 (1981). We decline to use this terminology because counseling by members of the clergy is frequently directed to matters that are essentially secular in nature. "Family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious aspects of a spiritual counselor's activities." Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 Rutgers L.J. 419, 437 (1988). *But see* Comment, *Made out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal.W.L.Rev. 507, 516 (1983) (pastoral counseling is a religious, not secular, activity in which "[i]t is impossible to separate

> the 'cure of the minds' from the 'cure of the souls'"); Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137, 139 (1986). ("While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective."). (763 P.2d at 285, n.10.)

B. Regardless of the Court's Perception of Homer Wolfe's Religious Beliefs, His Beliefs Are Entitled to First Amendment Protection

As discussed above, the allegedly culpable conduct of Homer Wolfe was a result of the practice of his religious beliefs. His religious practices are entitled to first amendment protection.

The religion clause in the first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The religion clause of the first amendment is also applicable to state action as a result of the fourteenth amendment (prohibiting abridgement of privileges or immunities). *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940).

The first amendment protects **all religious beliefs**. Religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit first amendment protection. *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425 (1981). Nor does it matter whether the religious belief

comports with a particular religious doctrine, whether the belief is true, or whether the conduct is in fact based on any bona fide religion. *Frazee v. Illinois Department of Employment Security, supra; Thomas v. Review Board of Indiana Employment Security Division, supra; Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971); *Cantwell v. State of Connecticut, supra.* Thus, the resolution of what is a religious belief or practice protected under the first amendment may not turn upon a judicial perception of a particular belief or practice. *Thomas v. Review Board of Indiana Employment Security Division, supra.* All that matters is that the person holds the religious belief. *United States v. Ballard,* 322 U.S. 78, 64 S.Ct. 882 (1944). It is uncontested in this case that the acts of Homer Wolfe occurred during pastoral counseling, and were part of his effort to help the counselee seek help from God. The acts were based on his religious beliefs, and are entitled to first amendment protection.

II. ADJUDICATION OF THE PLAINTIFFS' CLAIMS IS IN VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

A. A Civil Court Can Restrict the Free Exercise of Religion Only If It Finds A Compelling Interest In Doing So, Which Does Not Exist Here

The first amendment protects against state action respecting an establishment of religion or prohibiting free exercise thereof. See *Cantwell, supra.* State action includes common law tort rules, *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964); *Paul v. Watchtower Bible & Tract Society of New York,* 819 F.2d 875 (9th Cir. 1987), and court action, *Kreshik v. St. Nicholas Cathedral,* 363 U.S. 190,

191, 80 S.Ct. 1037 (1960); *Shelley v. Kraemer*, 334 U.S. 1, 14-18, 68 S.Ct. 836, 842-844 (1947); *Bernson v. Koch*, 35 Colo. App. 257, 534 P.2d 334 (1975). As stated in *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1984):

> The Church is a sanctuary, if one exists anywhere, immune from the rule or subjection to the authority of civil courts, either state or federal, by virtue of the First Amendment.

While the state can impose certain limitations on the free exercise of religion, this can only occur when the state can show that it has a compelling interest to regulate the activity. *Sherbert v. Verner*, 375 U.S. 398, 83 S.Ct. 1790 (1963). The compelling interest test is the most stringent test that the Supreme Court applies against state action. *Paul, supra.*

> Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323 (1945).

As expressed in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972):

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. (406 U.S. at 215, 92 S.Ct. at 1533.)

In this case, the plaintiffs claim they have suffered economic and non-economic damages as a result of emotional distress caused by defendant Wolfe's pastoral counseling. Such claims do not rise to a compelling interest allowing state action. As stated in *Paul, supra*:

> The test for upholding a direct burden on religious practices is as stringent as any imposed under our Constitution. Only in extreme and unusual cases has the imposition of a direct burden on religion been upheld. . . . Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices – or against its members. Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be meaningless.
>
> . . . . Although we recognize the harms suffered by Jean Paul are real and not insubstantial, permitting her to recover for intangible or emotional injuries would unconstitutionally restrict the Jehovah's Witnesses free exercise of religion. . . . The constitutional guarantee of the free exercise of religion requires that society tolerate the type of harms suffered by Paul as a price well worth paying to safeguard the right of religious difference that all citizens enjoy. (819 F.2d at 883-884.)

The Colorado legislature, by exempting religious counselors from regulatory provisions applied to secular counselors, has made a *de facto* determination that, as a matter of public policy, religious counseling does not pose a substantial threat to the health, safety and morals of society. See C.R.S. Sections 12-43-114(10); 12-43-215(1). As stated in C. Eric Funston, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal. West. Law Rev. 508 (1983) (one of the authorities cited by Justice Erickson in *Destefano* in support of dismissal of the clergy malpractice claim):

> Public policy, as enunciated by state legislatures, recognizes that free and unrestrained access to the clergy for counseling is valuable and required, that the clergy needs to be free of state imposed counseling standards, and "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations." California, for example, exempts the clergy from the licensing requirements applicable to marriage, family, child, and domestic counselors. In New York and California the clergy and religious organizations have been specifically exempted from operation of statutes requiring providers of mental health care to be licensed. These specially enacted exemptions not only imply a legislative recognition of the value of unrestricted pastoral counseling but also a determination such counseling is not threatening to public welfare. In light of these implications and the legislatures' clear intent that counseling by ministers not be subject to state regulation, actions based on the clergy malpractice theory, which would require the civil courts to perform such regulation, would appear to contravene public policy. (19 Cal. West. Law Rev. at 542.)

There is even less compelling interest to regulate activities among church members, than might be involved as to activities toward persons who are not church members. Plaintiffs DeBose were members of Bear Valley Church of Christ, and the counseling by Homer Wolfe was made available to them as members. As Justice Jackson said in his concurring opinion in *Prince v. Massachusetts*, 321 U.S. 158, 177, 64 S.Ct. 438, 445 (1944):

> [R]eligious activities which concern only members of the faith are and ought to be free – as nearly absolutely free as anything can be. (321 U.S. at 177, 64 S.Ct. at 445.)

The state does not have a compelling interest in regulating the pastoral counseling of Homer Wolfe, and the first amendment precludes this action against him.

B. State Action, If Justified, Must Consist of the Least Restrictive Alternative, Which Is Not a Civil Action

Even if a compelling interest is found to exist, the court must use only the least restrictive means in regulating religious activities. *Thomas v. Review Board, Ind. Emp. Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432; *Sherbert v. Verner*, 374 U.S. at 406, 83 S.Ct. at 1795.

Claims of breach of fiduciary duty and outrageous conduct are clearly not the least restrictive means of accomplishing the state's goal of protecting the public against the alleged conduct in this case. To impose liability under such theories (where the defendant does not acknowledge his conduct was not religious, as in *Destefano*), the court would have to make prohibited inquiries into religious faith. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601 (1969); *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D.N.Y. 1991).

The plaintiffs claimed fiduciary duties of Homer Wolfe and the Church based on religious grounds. This was not something that came up only incidentally, but permeated the entire case. In Bear Valley's First Set of

Interrogatories to Plaintiffs, Interrogatory 18 (Interrogatories with Answers attached hereto as Exhibit A), asked the plaintiffs to identify the members of the Church who owed the plaintiffs a fiduciary duty. The plaintiffs identified (in addition to Homer Wolfe) seven elders who had a fiduciary relationship with the plaintiffs. Interrogatory 18(g) asked the basis for the fiduciary duties. In all cases, the plaintiffs answered Interrogatory 18(g): "Hebrews 13:17 and outward expressions." Hebrews 13:17 states:

> Obey your leaders and submit to them, for they are keeping watch over your souls and will give an account. Let them do this with joy and not with sighing – for that would be harmful to you. (Hebrews 13:17.)

Did the defendants violate the duties of "keeping watch" over the plaintiffs' souls? Did God command the defendants to use other methods in responding to plaintiffs' requests for help than by the pastoral counseling provided? Under no circumstances may the court entertain any such questions which would require determinations of religious doctrine. *Frazee v. Illinois Department of Employment Security, supra; Thomas v. Review Board of Indiana Employment Security Division, supra; Lemon v. Kurtzman, supra; Cantwell v. State of Connecticut, supra.*

As shown above, the court would have to make proscribed factual inquiries into religious beliefs to determine a standard of conduct for pastoral counseling in order to adjudicate claims for breach of fiduciary duty and outrageous conduct. Justice Erickson in *Destefano, supra,* held that Edna's claim of negligence, which could include breach of fiduciary duty through lack of skill or lack of fidelity, was properly dismissed as a claim of

clergy malpractice, because it would have required impermissible inquiry as to the scope of pastoral counseling. The claim was properly dismissed since it would not be supported by precedent, and would raise "serious first amendment issues." (763 P.2d at 285.) Regulation of such activities by the state can be accomplished by statutes which are objective (such as for assault and battery, etc.), and do not require such proscribed inquiries. See *Dunn v. Blumstein*, 405 U.S. 330, 353, 92 S.Ct. 995, 1008 (1972) (Criminal statutes for fraud are the least restrictive means for regulating violation of voting registration requirements). Certainly, such criminal statutes would not impinge as greatly upon the first amendment as broad, vague, fact specific causes of action such as breach of fiduciary duty or outrageous conduct. See *Schmidt v. Bishop, supra.* (Rejecting civil action for clergy misconduct partly because state has adequate regulatory authority through criminal statutes for assault and battery); *Cantwell v. Connecticut*, 310 U.S. at 308, 60 S.Ct. at 905 (In overturning Cantwell's conviction of "breach of the peace" the Court disapproved of any law infringing on the first amendment which is of a "general and undefined nature"). Thus, a civil cause of action is not the least restrictive means to accomplish the state's goal and should not be allowed to proceed.

III. A CIVIL CLAIM AGAINST A PASTORAL COUNSELOR FOR IMPROPER COUNSELING WOULD ALSO VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The purposes of the religion clauses of the first amendment are twofold: to foreclose state interference

with the practice of religious faith and to foreclose the establishment of a state religion similar to those in other eighteenth century systems. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505 (1982). While a violation of the free exercise clause is based upon government coercion, a violation under the establishment clause need not be so attended. *School Dist. of Abington TP., PA v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 1572 (1963).

In *Engle v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267 (1962), Justice Black summarized the function of the establishment clause in the following way:

> Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of the Constitution that religion is too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. (370 U.S. at 431, 82 S.Ct. at 1267.)

The United States Supreme Court has elaborated many times on the establishment clause. The following quotations are illustrative of the court's interpretation of the clause:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to either be proscribed or prescribed by the State. *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 2656 (1992).
>
> The Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the community. Direct government action endorsing religion or

> a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. *Wallace v. Jaffree*, 105 S.Ct. 2474, 2496 (1985) (O'Connor, J. concurring.)
>
> Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution. *Lee v. Weismann*, 112 S.Ct. at 2661-2662 (Blackman, J., concurring.)

The establishment clause does more than just prohibit the establishment of a state church or state religion. Justice Burger explained this principle in *Lemon v. Kurtzman, supra*:

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state

> religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment. (Emphasis in original.)
>
> (403 U.S. at 612.)

The court in *Lemon* held that even where the state has a compelling interest in regulating religious activity, in no event can such regulation excessively involve the government with religion. To do so would violate the establishment clause. The court created a test to determine whether state action involved the state in religious activity to an impermissible extent. There are three prongs to the test. They are:

> 1. The law must have a secular purpose.
>
> 2. Its principal or primary effect must be one that neither advances nor inhibits religion.
>
> 3. The law must not foster "an excessive government entanglement with religion."

Lemon at 612-613.

In the context of clergy counseling, no attempt can be made to regulate the context or methodology of the religious counselor, for to do so would violate the *Lemon* test. Burek, *Clergy Malpractice: Making Clergy Accountable To A Lower Power, supra,* (another of the authorities cited by Justice Erickson in *Destefano, supra,* supporting dismissal of the clergy malpractice claim).

Claims for damages directed at pastoral counselors would fail all three of the *Lemon* criteria, for the following reasons:

1. Secular purpose.

If a civil court sets out to determine a standard of conduct for secular counseling to establish duty, which is one of the elements of a tort action, it means the pastor must proceed at his peril in practicing his religion. The pastoral counselor (and the church in which the pastoral counselor works) would be heavily burdened by the awarding of money damages when certain religious activity is practiced with methods later disapproved by a civil court. As shown in *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept, supra*:

> Judicial application of a standard of care for the clergy in their pastoral counseling ministry would not stand the test of the first prong of the *Lemon* inquiry. The purpose of such a standard would appear initially to be a secular one. The state undoubtedly has an interest in enforcing standards of conduct so that wrongs may be redressed. However, the secular purpose of developing and applying a clergy malpractice standard becomes increasingly less clear when one considers the nature of pastoral counseling. The conduct to be measured in a clergy malpractice action is the application of religious ideals to the problems of life. The wrong to be redressed in such a case might best be described as "harm . . . on the mental and spiritual plane." As Justice Jackson noted in his dissent in *United States v. Ballard*, these are "precisely the thing[s] the Constitution put[s] beyond the reach" of the civil authorities. In other words, these are

not matters of secular concern. (19 Cal. West. Law Review 530-531.)

2. Effect that neither advances nor inhibits religion.

The primary effect of such a common law cause of action would be to inhibit religious practice. Certainly, if one is to give money damages every time a pastoral counselor engages in activity of counseling which the state later deems as tortious, the primary effect will be that the practice would be impeded or cease to exist. As stated in *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept, supra*:

> Applying the second prong of the *Lemon* test, it would be naive to suggest judicial application of a pastoral counseling standard of care would have a neutral effect upon religion. Without doubt, the standard would be "a rule once laid down . . . to be followed . . . so that others now living and even those yet unborn may be affected by a decision made today." The practical effect of such a judicial standard of conduct would be essentially similar to that of the New York statute condemned in *Kedroff* or the trial court decision reversed in *Kreshik*. It would interfere with the decisionmaking ability of a denomination's authorities and with their supervision of the sect's pastoral counselors. Development of standards or supervisory models applicable to pastoral clergy is not the role of the courts; rather, it is the role of the denominations' seminaries and training problems. (19 Cal. West. Law Review at 531.)

3. Excessive government entanglement with religion.

Such common law rules would definitely create an excessive government entanglement with religion. In trying to determine the duties of a pastoral counselor, the court would necessarily have to inquire into the religious principles of the pastoral counselor to determine whether he deviated from the standard of conduct. This aspect is brought forward in plaintiffs' Amended Complaint, in which the following allegation was made:

> Wolfe had neither the education nor experience nor training to be providing pastoral counseling, and the Church was aware of his incompetence. (Para. 5, Amended Complaint.)

What type of education or experience should a pastoral counselor have? The plaintiffs asserted in trial that Homer Wolfe should have had more education for pastoral counseling, and used improper methods in his counseling. No determination of "improper" pastoral counseling can be made unless the court adjudicates what is "proper" pastoral counseling, which is clearly not permitted by the first amendment. Also implied in the plaintiffs' assertions is that the Church and Homer Wolfe's resistance to secular counseling is wrong. Therefore, the inescapable conclusion of the plaintiffs' assertions is that the defendants' religious beliefs are false. Such issues are not within the jurisdiction of a civil court.

Also, plaintiffs' answers to Bear Valley's Interrogatories further exemplify why such a

claim impermissibly entangles the court in religious affairs. As stated above, the plaintiffs claimed that the basis for the fiduciary duty was Hebrews 13:17.

In answer to Interrogatory 7, of Exhibit A, which asked for the facts which supported the plaintiffs' claims of negligent hiring and supervision of defendant Wolfe, the plaintiffs answered in part:

> . . . . In addition, if the Elders had done the normal hiring procedures and not just trusted Wolfe because he was a "Christian" as the basis for Wolfe's employment, the Elders would have seen his inexperience and track record, as previously stated, which did not make him a viable candidate for the job of family life minister.

Was the Church negligent for using "Christian" principles for the hiring of defendant Wolfe rather than "normal" hiring procedures? Obviously, the court's adjudication of proper or improper hiring procedures for a church is yet another impermissible inquiry entangling the state in religion.

To use the above bases for claims of breach of fiduciary duty is in total contravention of the first amendment. *Frazee v. Illinois Department of Employment Security, supra*); *Thomas v. Review Board of Indiana Employment Security Division, supra; Lemon v. Kurtzman, supra; Cantwell v. State of Connecticut, supra.*

A recent decision, *Schmidt v. Bishop, et. al., supra,* confronts issues strikingly similar to those of this case. The court, after extensive analysis, dismissed an action

against a clergyman and church in which it was claimed that the clergyman had sexually abused a twelve-year old during counseling. Portions of the court's opinion follow:

> . . . (I)n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence . . . (A)s with her negligence claim, Ms. Schmidt's fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice. (779 F. Supp. at 326.)
>
> It would be impossible for a court or a jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent Presbyterian pastor"), following his calling, or practicing his profession within the community. (779 F. Supp. at 327.)
>
> This Court . . . regards the unconstitutionality as more than possible. It is real. . . . Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as

> it is impossible. It fosters excessive entanglement with religion. (779 F. Supp. at 328.)

Likewise, if the secular duties are imposed on the pastoral counselor, the court would be impermissibly encroaching on the first amendment. As stated in *Clergy Malpractice: Making Clergy Accountable to a Lower Power, supra,* (also cited by Justice Erickson in support of the dismissal of the clergy malpractice claim):

> [A secular standard], one which is identical to the standard imposed on psychiatrists and psychologists, is impractical and is violative of constitutional protections. As Rabbi Ben Zion Bergman notes, "[t]he same level of competence and professional knowledge cannot be expected from the clergyman as can be expected from the psychiatrist, whose education and training is more intensively specialized." Since the training of the clergy varies from that of licensed psychologists, so must the standard of care.
>
> In order to determine if a psychiatrist has violated the standard of care, comparisons are made between the alleged offender and established therapists, focusing on fundamental techniques and principles. However, since members of the clergy often do not follow conventional secular counseling models or practice similar techniques, the proposed standard breaks down. The vast diversity within the religious community makes a comparison of accepted religious techniques virtually impossible, even to the point of identifying an acceptable standard. Since the fundamental concepts of the clergyman-counselor are foundationally religious in nature, the courts cannot scrutinize their validity without facing constitutional bars.

> Consequently, a secular standard cannot be imposed because of the inherent difficulty in evaluating an alleged offender's conduct using secular criteria *and* because the content and methodology are beyond the scope of judicial review. (14 Pepperdine Law Rev. at 152.)

IV. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR THIS CASE

As stated in Sections I, II and III of this argument, adjudication of the plaintiffs' claims in a civil court is prohibited by the first amendment. Whenever a court is prohibited from adjudicating a claim, it is the same as stating that the court does not have subject matter jurisdiction over the matter. See *Davis v. Bacon*, 133 U.S. 333, 10 S.Ct. 299, 301 (1890) (In determining whether the Idaho statute against polygamy was valid as against a free exercise defense the court stated: "On this appeal our only inquiry is whether the district court of the territory had jurisdiction of the offense charged in the indictment of which the defendant was found guilty."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601 (1969) (First Amendment precluded resolution of property dispute between local churches and general church by civil court on basis of departure-from-doctrine standard). Thus, if the plaintiffs' claims are unconstitutional, the court does not have subject matter jurisdiction to hear the claims.

CONCLUSION

The first amendment rights of free exercise of religion, and prohibition of laws respecting the establishment of religion, preclude a civil court from adjudicating the claim of breach of fiduciary duty and outrageous conduct asserted by plaintiffs in this case. Although the court may determine that the plaintiffs' damages are real and substantial, to allow recovery would unconstitutionally restrict the defendants' rights of free exercise and impermissibly entangle the court in religious matters. Given the above, the court should grant judgment in favor of defendant Wolfe notwithstanding the verdict.

. . . .

MOTIONS FOR NEW TRIAL

. . . .

3. MOTION FOR NEW TRIAL WITH RESPECT TO JURY INSTRUCTIONS

Defendant Wolfe moves the court to grant a new trial in this matter on the grounds that certain instructions were submitted to the jury over the defendant's objections constituting prejudicial error. The grounds for this motion are as follows:

. . . .

INSTRUCTION NO. 34:

The court submitted instruction No. 34 to the jury over defendant's objections. Defendant Wolfe objected to paragraphs 2 and 3 of this instruction submitted to the jury as not being appropriate for the circumstances of this

case. The instruction was inappropriate for the following reasons:

(a) The First Amendment does not allow the court to make judicial determinations of religious views. Instruction No. 34 required the jury to determine whether a reasonable person in the community would regard Homer Wolfe's religious practice as outrageous. Such a determination cannot be made by a civil court. See Defendant Wolfe's Motion for J.N.O.V., *supra*.

. . . .

CONCLUSION

Because of prejudicial error in the Instructions given to the jury, a new trial should be ordered.

. . . .

8. MOTION FOR NEW TRIAL REGARDING DEFENDANT WOLFE'S TENDERED AND REFUSED JURY INSTRUCTIONS

On July 24, 1992, counsel for defendant Wolfe tendered seven Jury Instructions which were refused by the court. The refusal of these Instructions constituted prejudicial error and a new trial should be granted.

The grounds for this Motion are as follows:

INSTRUCTIONS NOS. 1 AND 2:

Instructions Nos. 1 and 2 referred to standards under which a claim must be dismissed when there is an issue of the free exercise of religion. For the reasons stated in defendant Wolfe's Motion for J.N.O.V. on the issue of the

first amendment, it was prejudicial error for the court to refuse to submit the Instructions.

INSTRUCTIONS NOS. 3 AND 4:

Instructions Nos. 3 and 4 would have made it clear to the jury that mere negligence of defendant Wolfe would not support a finding of liability for breach of fiduciary duty. It was prejudicial error to allow the jury to consider anything but intentional breach of fiduciary duty.

As stated in defendant Wolfe's Motion for J.N.O.V. regarding the first amendment, none of the claims against defendant Wolfe should have proceeded in this action. The following matters are asserted without prejudice to that contention.

In *Destefano v. Grabrian, supra,* the court held that the claim of plaintiff Edna Destefano alleging professional negligence of the defendant priest was properly dismissed by the trial court because it constituted a claim of "clergy malpractice," which the court held would not be actionable. The ruling of the Colorado Supreme Court on this issue is explained as follows. (In the following quotation, citations are omitted, where indicated by " . . . "):

> Edna's second claim for relief alleges that Grabrian "negligently performed his duty as a marital counselor" and that a member of the clergy who represents himself as a competent martial counselor, has a duty to employ the degree of knowledge, skill, and judgment ordinarily possessed by members of that profession in the community. This claim of professional negligence is a claim for malpractice. . . .

> Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. . . . Since Grabrian is a Catholic priest, the malpractice claim alleged by Edna falls within the realm of "clergy malpractice." . . . To date, no court has acknowledged the existence of such a tort. . . . Since the claim for clergy malpractice is not supported by precedent and raises serious first amendment issues, we have concluded that Edna's second claim for relief was properly dismissed. We do not recognize the claim of "clergy malpractice." (763 P.2d 275 at 285)

After the quoted language, the court continues with further cogent analysis of the rationale for its ruling, which leads to the statement that " . . . we conclude that Edna's second claim for relief was properly dismissed." (763 P.2d at 286)

It was implicit in *Destefano, supra,* that the Supreme Court viewed the First Claim for Relief of plaintiff Edna against defendant Grabrian, the priest, for "breach of fiduciary duty," as being a claim of intentional conduct, which was held to have been improperly dismissed by the trial court. Because Edna had asserted a separate claim based on alleged negligence of the priest, the effect of the Colorado Supreme Court analysis and decision was to hold that a claim based on intentional breach of fiduciary duty was actionable, while it is implicit that the court would not sanction any claim against the priest based on negligence, even if such a claim were characterized as "negligent breach of fiduciary duty," because it would still constitute "clergy malpractice."

In the trial of this case, the plaintiffs alleged "breach of fiduciary duty," seeking by this omnibus approach to pursue a claim which could include negligent pastoral counseling (clergy malpractice), which would contravene *Destefano, supra.*

Despite the efforts of plaintiffs' counsel by semantics to change the substance of the opinion in *Destefano, supra,* the fact remains that the fiduciary relationship between Homer Wolfe and plaintiff J.D.B. in this action was analogous to the fiduciary relationship between the Catholic priest, Grabrian, and the parishioner, Edna Destefano. The Supreme Court unequivocally ruled that the claim of Edna Destefano against defendant Grabrian based on negligent breach of the fiduciary duty was properly dismissed because it constituted a claim for clergy malpractice, which the court stated is not a tort recognized in Colorado or elsewhere.

The arguments of plaintiffs' counsel might have been appropriate if this case involved conduct of a secular fiduciary, for example a stockbroker, realtor or (non clerical) psychologist or counselor. The distinguishing circumstance in this case, as in *Destefano, supra,* is that defendant Wolfe is a minister, and as held by the court in *Destefano, supra,* it would not be appropriate to allow a claim for clergy malpractice, because of first amendment concerns.

As further elaboration of the difference between legal treatment of secular and religious counseling, the supreme court in *Destefano, supra,* analyzed statutes enacted by the General Assembly of Colorado, in which it

is made clear that the legislature intends to exempt ministers from statutory regulations applicable to psychologists and counselors in general. The court concludes the analysis as follows:

> Since the General Assembly has shown an intent to exclude religious counselors from the liability provisions of the statute creating liability for mental health professionals, we conclude that Edna's second claim for relief was properly dismissed. 763 P.2d 286, following discussion beginning on page 285.

As a result of the court's refusal to submit defendant Wolfe's Instructions Nos. 3 and 4 to the jury, the jury was allowed to consider all forms of conduct which might have formed a basis for breach of fiduciary duty, which is in contravention of *Destefano, supra.*

. . . .

CONCLUSION

Because of the prejudicial error in refusing to give defendant Wolfe's tendered Instructions, a new trial should be ordered.

9. INCORPORATION BY REFERENCE

Defendant Wolfe adopts and incorporates herein by reference all post-trial motions and arguments of defendant Bear Valley Church of Christ, to the extent they are applicable.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By_____

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CERTIFICATE OF SERVICE

I hereby certify that copies of Defendant Wolfe's Post-Trial Motions have been served on attorneys of record by depositing same in the United States mail, postage prepaid, addressed to the following on September 10, 1992:

Ms. Joyce Seelen
One Norwest Center
1770 Lincoln Street, Suite 2530
Denver, Colorado 80203

Mr. Neil Quigley
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

_____

_____

APPENDIX M

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 91 CV 4346, Courtroom 2

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT WOLFE'S POST-TRIAL MOTIONS

DENISE DeBOSE, and J. D. B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiffs,

v.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Defendants.

Defendant Wolfe submits the following Reply to plaintiffs' Response to Defendant Wolfe's Post-Trial Motions.

I. OVERVIEW OF FIRST AMENDMENT ISSUES INVOKED BY DEFENDANT WOLFE'S FIRST AMENDMENT MOTION J.N.O.V.

A. A Pastoral Counselor Has Constitutional Rights

The plaintiffs have asserted that counsel for defendant Wolfe advocate total religious immunity for sexual molestation of children. Such is not the case. What we do say is that any state action against a pastoral counselor

must not infringe rights protected by the first amendment. The state has the power to regulate "sexualized" touching (a term employed by plaintiffs' counsel); by legislation which applies uniformly to every citizen, such as statutory prohibition of assault, or similar offenses. The problem with allowing tort actions for breach of fiduciary duty or outrageous conduct against a pastoral counselor, is that such claims intrinsically require the court to make an *ad hoc* judgment in each case as to the nature of a pastoral counselor's duty, which impinges upon the rights protected by the first amendment.

B. The First Amendment Is a Limit on State Action Exercised by Any Branch of Government

The free exercise of religion is a fundamental right. *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 1532 (1972). The first amendment is designed to limit the power of the state to exert restraints on the fundamental right of free exercise of religion. *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688 (1990). Contrary to the plaintiffs' assertion, the state does not have unbridled authority to regulate religious conduct.

The plaintiffs assert that these constitutional limitations only extend to the "deciding [of] questions where the rule of decision is based on ecclesiastical principles." (Plaintiffs' brief, p. 2.) Counsel for the plaintiffs oversimplifies first amendment jurisprudence. The limitations of the first amendment go far beyond that. It is clearly established that judicial action is not immunized from

constitutional limitations simply because it is taken pursuant to the state's common law policy. *Shelly v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948).

Whether it be legislative or judicial, the limits of power apply equally. *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037 (1960). The court in *Kreshik* stated:

> . . . it is established doctrine that "[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."

The limits extend to all forms of state action which have the effect of abridging first amendment rights. *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *N.Y. Times*, 84 S.Ct. at 718. With regard to the first amendment, the "law reaches past formalism." *Lee v. Weisman*, 112 S.Ct. 2649, 2659 (1992). The first amendment restricts state action regardless of its form. In the present case, the state has acted through its judiciary in a manner which is beyond the permissible limits.

II. REPLY TO PLAINTIFFS' "RESPONSE TO DEFENDANT WOLFE'S POST-TRIAL MOTIONS" REGARDING THE FREE EXERCISE CLAUSE

A. Compelling Interest Test Must Be Used to Determine Whether the Law Itself Is Constitutional Under the Free Exercise Clause

In defendant Wolfe's Motion J.N.O.V. regarding the first amendment, counsel for defendant Wolfe articulated the test for determining whether claims for breach of fiduciary duty and outrageous conduct of a pastoral counselor are precluded by the free exercise clause. A summary of defendant Wolfe's free exercise analysis is as follows:

> When the state invokes a law which coerces religious conduct by prescribing or proscribing the action, the state must show (1) a compelling interest in regulating the religious activity; and (2) the regulation must be the least restrictive means in regulating the activity. The state has directly coerced defendant Wolfe's religious beliefs without a compelling interest or has not used the least restrictive means. (See authorities cited in defendant Wolfe's Motion.)

The plaintiffs claim that the 1990 decision of *Employment Division, Department of Human Resources of Oregon v. Smith*, ___ U.S. ___, 110 S.Ct. 1595 (1990), holds that the compelling interest test should no longer be used in free exercise analysis. Although *Smith* does question the need for compelling interest analysis where there is a specific statute of uniform application to all citizens as to clearly defined conduct, it is clear that the compelling interest test is intact for the area of constitutional analysis in the

present case. The difference is that in *Smith*, the individuals were found to have engaged in conduct clearly and specifically prohibited by a criminal statute. A criminal statute is the least restrictive state action, because it can unequivocally spell out in advance the conduct which is proscribed, so that every citizen can be aware that he is to refrain from that specified conduct. (See defendant Wolfe's Motion J.N.O.V., p. 9.) No similarity exists between that state action, and the proceedings in the present case, where the court has used its jurisdiction to determine what the duty of a pastoral counselor is, and award damages for breach of the duty, after the fact.

The Smith case involved denial of unemployment compensation benefits to Smith, after he had been discharged by his employer for using peyote. Smith argued that the use of peyote had been part of a sacrament and was protected by the first amendment. An Oregon statute made it unlawful to use peyote, without reference to sacramental use. The United States Supreme Court first remanded the case to the Oregon Supreme Court for further findings. The Oregon Supreme Court found that Oregon state law would not apply any exemption from the statute for sacramental use of peyote. The United States Supreme Court then granted certiorari again. In that proceeding, it held that the statute did not violate first amendment rights because it was a statute of uniform application precluding specified conduct by any citizen. The majority in Smith did question the necessity of applying a compelling interest test, but said as to the case before it:

> Whether or not the decisions are that limited, they at least have nothing to do with an

> across-the-board criminal prohibition on a particular form of conduct. *Smith,* 110 S.Ct. at 1603.

The compelling interest test had been applied in numerous previous first amendment cases. (See cases and law review articles cited in defendant Wolfe's Motion J.N.O.V., pp. 5-7.)

Even in the same term as the *Smith* decision, the unanimous court applied the compelling interest test to determine whether an exemption should be made to civil tax law under the free exercise clause. See *Jimmy Swaggart Ministries v. Board of Equalization, supra.* (*Swaggart* found that a compelling interest existed, but it is cited to support the continuing requirement of compelling interest analysis, except in cases like *Smith.* As will be shown, the issues of this case are totally unlike those of *Smith.*) The issue in *Smith* involved a prospective statute uniformly prohibiting use of peyote by *any* citizen. This dispensed with the need for determining any standard of conduct, and in that respect the facts of *Smith* are patently unlike those of this case, where the court is asked to determine after the fact the proper extent of defendant Wolfe's pastoral counseling, and to require him to pay damages if that extent is considered to have been exceeded. The compelling interest test is still required except in limited circumstances such as in *Smith,* where a specific statute of uniform application had been violated.

Thus, the compelling interest test must be applied here for the reasons set forth in defendant Wolfe's Motion J.N.O.V. directed toward the first amendment.

B. *Smith* Is Also Inapplicable Since the Asserted Tort Claims Are Not "Valid and Neutral Laws of General Applicability"

The plaintiffs assert that any general law is equivalent of "a valid, neutral law of general applicability." (Plaintiffs' Response to Defendant Wolfe's Post-Trial Motions, p. 3.) This assertion is incorrect. In a recent Supreme Court case of *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992), the court was determining whether the state had taken property without just compensation. In the court's analysis, the majority analogized the "general" state law with the analysis of general law in first amendment jurisprudence. The court stated:

> Drawing on our First Amendment jurisprudence, see, e.g., *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-879, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990), Justice Stevens [the author of the dissenting opinion in this case] would "look to the *generality* of a regulation of property" to determine whether compensation is owing. *Post*, at 2923. The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state." *Post*, at 2924. There may be some validity to the principle Justice Stevens proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith, supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law – the generally

> applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind – cannot constitute a compensable taking. See 123 U.S., at 655-6546, 8 S.Ct. at 293-294. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. Justice Stevens' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

Contrary to plaintiffs' assertions, the tort claims of breach of fiduciary duty and outrageous conduct against a pastoral counselor are, by definition, directed towards religious conduct. It is inconceivable that one could have a claim for breach of fiduciary duty of a pastoral counselor and use the fiduciary duties of a secular counselor to premise the claim. The plaintiffs' claims are thus necessarily directed towards defendant Wolfe's religious activities and are directly coercing his religious expression. This is exactly the reason which Justice Erickson cited in *Destefano,* in rejecting the claim of clergy malpractice. As discussed at length in our original Motion, the reason Edna's first claim was allowed in *Destefano* was that both the priest and the Diocese acknowledged the conduct had no religious basis. The holding of *Destefano* that applies to this case is the dismissal of Edna's second claim on grounds that it was a claim which would have required the court to determine a standard of conduct for a priest, which would violate the first amendment.

Homer Wolfe testified that as a counselor, he could only help the counselee to communicate with God, and

that such communication was sometimes facilitated by massaging the counselee to help him relax. Plaintiffs' counsel called this "sexualized touching," and said it was improper counseling, which is another way of saying clergy malpractice. Claims of this kind which depend on the exercise of judicial discretion would subject all clergy conduct to the scrutiny of civil courts as to its propriety, which would clearly be coercive.

A law which directly coerces religious conduct is *per se* unconstitutional. The majority noted in *Smith, supra*:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf. *Smith*, 110 S.Ct. at 1599.

The claims asserted here by the plaintiffs directly coerce religious beliefs and conduct by design. It is clear that the compelling interest test should be applied and the plaintiffs' claims found unconstitutional.

III. REPLY TO PLAINTIFFS' "RESPONSE TO DEFENDANT WOLFE'S POST-TRIAL MOTIONS" REGARDING ESTABLISHMENT CLAUSE

In the plaintiffs' "Response to Defendant Wolfe's Post-trial Motions," counsel for the plaintiffs spent much time discussing the free exercise clause and especially the *Smith* case. However, with the exception of a single conclusory statement that " . . . the plaintiffs' claims are not barred by the first amendment, including the excessive entanglement aspect of the establishment clause test . . . ," the establishment clause analysis was not discussed. There are three prongs to the tests set out in *Lemon v. Kurtzman*, 1403 U.S. 602, 91 S.Ct. 2105 (1971), to determine whether an action violates the establishment clause. They are:

1. The law must have a secular purpose.
2. Its principal or primary effect must be one that neither advances nor inhibits religion.
3. The law must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612, 91 S.Ct. at 2112.

In defendant Wolfe's Motion J.N.O.V., we demonstrated that the tort claims of fiduciary duty and outrageous conduct violate all three prongs of the *Lemon* test. Apparently, counsel for plaintiffs concedes that the first two prongs are violated, because she did not contest those assertions. With regard to the third prong, counsel for the plaintiffs makes only a conclusory remark that the claims are not violative of the "excessive entanglement

aspect of the establishment clause test." She cites no authority for that conclusory remark.

Plaintiffs have made no substantive response to defendant Wolfe's arguments based on the establishment clause, which must be construed to mean that plaintiffs have no response to offer.

. . . . . .

CONCLUSION

The court should grant defendant Wolfe's Motion J.N.O.V. and dismiss all claims against defendant Wolfe, or in the alternative, order a new trial or amend the judgment.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By _____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply of Defendant Wolfe to Plaintiffs' Response to Defendant Wolfe's Post-Trial Motions have been served on attorneys of record by depositing same in the United States mail,

postage prepaid, addressed to the following on September 25, 1992:

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Denver, Colorado 80209

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APPENDIX N

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 91 CV 4346, Courtroom 2

COURT'S ORDER RE: DEFENDANT WOLFE'S POST-TRIAL MOTIONS

DENISE DeBOSE, and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Plaintiff(s),

vs.

HOMER WOLFE and BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Defendant(s).

THIS MATTER comes before the Court pursuant to Defendant Wolfe's Post-Trial Motions filed under the authority of Colo. R. Civ. 59. The Court, having reviewed the Motions, briefs, having presided over the trial and being fully advised, hereby FINDS AND ORDERS as follows:

1. Defendant Wolfe's Post-Trial Motions are denied for the reasons previously articulated by the Court during the trial of the within action, as well as for the reasons articulated by Plaintiffs in their Response to Defendant Wolfe's Post-Trial Motions.

THEREFORE, Defendant Wolfe's Post-Trial Motions are hereby DENIED.

DATED this 22nd day of October, 1992

BY THE COURT:

/s/ Herbert L. Stern, III
Herbert L. Stern, III
District Court Judge

cc: Counsel of Record

FILED

(2) 96 1637 APR 14 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE, JOHN DeBOSE, and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Colorado

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME II, APP. 192 TO APP. 340

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APPENDIX O

COURT OF APPEALS, STATE OF COLORADO

Case No. 42-CA935

NOTICE OF APPEAL ON BEHALF OF DEFENDANT-APPELLANT WOLFE

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern III, District Judge

APPELLANT (PARTY INITIATING THIS APPEAL): Homer Wolfe

TRIAL COURT CASE NO.: 91-CV-4346

COMES NOW the appellant, Homer Wolfe, by and through his attorneys, Blunk, Johnson & Johnson, and submits this Notice of Appeal pursuant to Rule 3 and 4, Colorado Appellate Rules.

NATURE OF CASE (pursuant to Rule 3(d)(2), C.A.R.):

A. Nature of Controversy

This was a tort action brought by the plaintiffs seeking damages for injuries claimed to have been sustained because of allegedly improper counseling administered to plaintiff John DeBose by defendant Homer Wolfe, and related acts or omissions by defendant Bear Valley Church of Christ, Defendant Wolfe provided pastoral counseling services to members of the Bear Valley Church of Christ congregation, including John DeBose. He counseled Mr. DeBose during 1983 and occasionally from 1985 through June of 1988. Although no complaints were raised at the time, the plaintiffs now allege that defendant Wolfe sometimes touched Mr. DeBose during counseling sessions in ways that made him feel uncomfortable. This involved Mr. Wolfe's practice of hugging counselees, to show friendship and acceptance, and massaging of counselees to relax them. There are no allegations of actual sexual activity between Homer Wolfe and John DeBose, but the plaintiffs have attempted to characterize defendant Wolfe's actions as involving sexual assault or sexual abuse.

Plaintiff Denise DeBose filed this action in the Denver District Court on her own behalf and on behalf of her son, seeking economic and non-economic damages, as well as punitive damages, from Homer Wolfe personally and from the Bear Valley Church of Christ.

All the counseling activities of defendant Wolfe involved pastoral counselling, which the defense counsel maintain should be protected by the First Amendment to

the United States Constitution. Defense counsel maintain that, under a proper reading of the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), all the plaintiff's claims would be barred. The trial court ruled to the contrary, and allowed the case to be presented to a jury on issues of breach of fiduciary duty, outrageous conduct, and exemplary damages against both defendants, and allegations of negligent hiring and supervision against Bear Valley Church of Christ.

The jury returned verdicts in favor of both plaintiffs against both defendants. Defendant Wolfe appeals the judgments entered against him.

Counsel for this appellant note that plaintiff John DeBose was identified in the caption of the case in the trial court as "J.D.B.," because he was a minor at that time. Mr. DeBose has since turned 18, and therefore reached majority under C.R.S. §13-21-101. However, Attorney Joyce Seelen, who represents the DeBoses, has requested that we continue to refer to Mr. DeBose by his initials only in the caption of this Notice of Appeal, although she has agreed that he may be referred to my name elsewhere in this Notice of Appela (and in other appellate papers, except in the captions). Until we have a ruling from the court as to whether a litigant is entitled to this treatment once he has reached majority, we have acceded to Ms. Seelen's request.

B. Judgment Being Appealed

This appeal seeks reversal of the Judgment entered in favor of the plaintiff and against the defendants on the jury's verdicts at the conclusion of the jury trial in this

case, which started on July 13, 1992, and concluded on July 31, 1992. The order for entry of judgment was dated August 4, 1992. Post-trial motions were filed by defendant Wolfe, and the filing of those motions extended the time for filing of this Notice of Appeal, as provided in Rule 4(a), C.A.R. This appeal includes various issues already raised in post-trial motions, appealing the trial court's denial of those motions. However, in accordance with Rule 59(b), C.R.C.P., this appeal is not necessarily limited to issues raised in post-trial motions.

Jurisdiction is based on Rule 1(a)(1), C.A.R.

C. Extent of Issues Resolved by the Judgment Being Appealed

The judgment appealed is the judgment entered August 4, 1992, on the jury's verdict ["Court's Order Re: Judgment (Trial to Jury)"]. That Order provided for entry of judgment in favor of each plaintiff and against each defendant in certain amounts, and provided for "interest as allowed by law and costs to be determined," but did not set forth the amounts of interests or costs to be included in the judgment.

Secondary issues relating to interest, costs, and attorneys' fees were resolved by the "Court's Order Re: Plaintiff's Post-trial Motions" (dated October 22, 1992), the "Court's Order Re: Amended Judgment" (dated November 10, 1992), and the "Court's Order Re: Plaintiffs' Bill of Costs" (dated November 10, 1992). Issues relating to interest and costs may be raised in a separate appeal. However, as set forth below, counsel for this appellant are proceeding with the understanding that there was a final

judgment for purposes of appeal on the central judgment when the post-trial motions were denied. The trial court ruled on all post-trial motions on October 22, 1992. [See the "Court's Order re: Defendant Wolfe's Post-trial Motions," the "Court's Order Re: Defendant Bear Valley Church of Christ's Post-trial Motions," and the "Court's Order Re: Plaintiffs' Post-trial Motions," all signed October 22, 1992.]

D. Finality of Judgment Appealed

Under the holding of *Baldwin v. Bright Mortgage Company*, 757 P.2d 1072 (Colo. 1988), counsel for this appellant understand the judgment originally entered on the principal issues determined by the jury in favor of the plaintiffs to have become a final judgment for purposes of appeal on October 22, 1992, when the court denied post-trial motions. This is true even though the trial court had not yet determined entered a specific judgment on secondary issues relating to interest and costs at that time. The appeal represented by this Notice of Appeal relates to substantive issues involved in that principal judgment. The cited case does not require a Rule 54(b) certification before the principal judgment becomes final for purposes of appeal.

Under the holding of *Baldwin v. Bright Mortgage Company, supra*, counsel for this appellant understand the part of the Amended Judgment setting forth interest allowed to the plaintiff to have become a final judgment for purposes of appeal on November 10, 1992, when the "Court's Order Re: Amended Judgment" was entered,

and likewise understand the "Court's Order Re: Plaintiff's Bill of Costs" to have become a final judgment for purposes of appeal on November 10, 1992, when it was entered. A separate appeal regarding those secondary issues may be brought at a later date.

E. Date Judgment Entered

The original judgment on the jury verdicts was entered August 4, 1992. It is believed that the "Court's Order Re: Judgment (Trial by Jury)" was mailed to counsel by the court on either August 5 or 6, 1992. It was received by counsel on August 7, 1992.

The order denying defendant Wolfe's post-trial motions was entered on October 22, 1992. It is believed that the "Court's Order Re: Defendant Wolfe's Post-trial Motions" was mailed to counsel on either October 22 or 23, 1992. It was received by counsel on October 26, 1992.

F. Date of Post-trial Motions Extended Filing Deadline

Defendant Wolfe sought an enlargement of time to file post-trial motions on August 11, 1992. The court granted defendant Wolfe's request for an extension of time to file post-trial motions through September 10, 1992.

G. Date Post-Trial Motions Filed

Defendant Wolfe's post-trial motions were filed on September 10, 1992, the extended due dated.

H. Date Post-trial Motions Denied

Defendant Wolfe's post-trial motions were denied on October 22, 1992.

I. Extensions to File Notice of Appeal

No extension of time was requested to file this Notice of Appeal.

ADVISORY LISTING OF THE ISSUES TO BE RAISED ON APPEAL (pursuant to Rule 3(d)(3), C.A.R.)

Defense counsel provide the following advisory listing of issues which may be raised on appeal:

A. Whether the trial court committed reversible error in ruling that defendant Wolfe was not entitled to the protection of the First Amendment to the U.S. Constitution with respect to the claims asserted in this case, both under the "establishment" clause and the "free exercise" clause. This would include errors in ruling on pretrial motions relating to the First Amendment, in ruling during trial relating to the First Amendment (including evidentiary rulings, ruling on motions for directed verdict, and rulings on jury instructions), and rulings on post-trial motions relating to the First Amendment. (To the extent that the trial court's rulings with respect to claims against the co-defendant, Bear Valley Church of Christ, had a deleterious effect on defendant Wolfe, we may also argue the application of the First Amendment to the co-defendant. See, e.g., item L., below.)

B. Whether the trial court had subject matter jurisdiction over the claims stated in this case, given the First Amendment protection available to the defendants.

C. If there was some factual issue regarding the application of the First Amendment under the circumstances of this case, whether the trial court committed reversible error in failing to submit that factual issue to the jury for determination.

D. Whether the trial court committed reversible error in allowing the plaintiffs' claims for breach of fiduciary duty to go to the jury. Under the circumstances of this case such claims violate the First Amendment, and in allowing those claims to go forward the trial court misinterpreted the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

E. Whether the trial court committed reversible error in allowing the plaintiff's claims for "outrageous conduct" to go to the jury. Under this theory the jury was allowed to award damages based on laymen's perceptions of religiously motivated conduct, and to impose liability based on conduct was merely reckless (as opposed to intentional), in violation of the First Amendment. To the extent the trial court relied on the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), to support its rulings, the trial court misinterpreted that decision.

F. Whether the plaintiffs' claims actually constituted claims for "clergy malpractice," which are barred under the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

G. Whether the trial court committed reversible error in its interpretation and application of the Colorado Supreme Court's holding in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

H. If the trial court correctly applied the Colorado Supreme Court's holding in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), whether that holding violates the First Amendment to the United States Constitution, including the "establishment" clause and the "free exercise" clause.

I. Whether the trial court committed reversible error in allowing plaintiff Denise DeBose's claims to go to the jury. If the acts allegedly committed by defendant Wolfe were properly actionable as a breach of a fiduciary duty or as "outrageous conduct," those acts did not involve a breach of any fiduciary duty owed to plaintiff Denise DeBose or any conduct directed to her, and she would have no personal right of action based on conduct directed to plaintiff John DeBose.

J. Whether the trial court committed reversible error in submitting to the jury the claims of plaintiff Denise DeBose, in view of the statute of limitations. The claims of plaintiff Denise Debose should have been subject to a two-year statute of limitations period, as set forth in C.R.S. 13-80-102, and she failed to commence her action within two years of the date of accrual.

K. Whether the trial court committed reversible error in failing to require the plaintiffs to elect an entry of judgment on either their outrageous conduct claim or breach of fiduciary duty claim. The plaintiffs can properly pursue damages under alternative theories of recovery, but should not be permitted to have judgment

entered on two different theories under which the elements of damages recoverable are the same or substantially the same.

L. Whether the trial court committed reversible error in admitting hearsay and direct testimony regarding "other acts" allegedly committed by defendant Wolfe. If the justification for the admission of this testimony was the issue of notice to the Board of Elders of the Bear Valley Church of Christ in connection with the negligent hiring/supervision claim, then a ruling that such a claim was barred by the First Amendment would correspondingly remove the justification for admitting that testimony into evidence on that limited issue. Furthermore, because the testimony was utilized by plaintiffs' counsel in a manner contrary to the limiting instruction read to the jury, as if the testimony had been received without limitations to prove the truth of the matters asserted, the admission of this evidence even for a limited purpose was reversible error. The unfair prejudice to defendant Wolfe outweighed any possible probative value this evidence might have had, and the evidence should have been excluded entirely. This would include errors in ruling on pre-trial motions relating to this evidence, in ruling during trial, and rulings on post-trial motions.

M. Whether the trial court committed reversible error in admitting the plaintiffs' expert witnesses' characterization of defendant Wolfe's conduct as sexual assault or sexual abuse.

N. Whether the trial court committed reversible error in giving the following jury instructions, over the objections of defense counsel:

1. Instruction No. 20, regarding "looking but failing to see."

2. Instruction No. 34, regarding "outrageous conduct."

3. Instruction No. 38, regarding breach of fiduciary duty, in particular the part of the instruction allowing the jurors to award tort damages for "loss of faith" and the part of the instruction referring to defendant Wolfe's "negligence."

4. Instruction No. 40 and 47, relating to fiduciary duty, in particular the part of the instruction referring to defendant Wolfe's "negligence."

5. Instruction No. 48, the "thin skull" instruction.

Defendant Wolfe asserts that the trial court committed error in denying his Motion for New Trial with Respect to Jury Instructions, for reasons set forth in defendant Wolfe's Post-trial Motions.

O. Whether the trial court committed reversible error in refusing to give the following jury instructions tendered by defendant Wolfe:

1. Defendant Wolfe's tendered instructions Nos. 1 and 2, regarding the First Amendment.

2. Defendant Wolfe's tendered instruction No. 3 and 4, regarding the type of conduct required to establish an actionable "breach of fiduciary duty" under the circumstances of this case.

3. Defendant Wolfe's tendered instruction No. 5, which stated the "thin skull" instruction

in conjunction with the "pre-existing condition" instruction. If a "thin skull" instruction was to be given at all, it should have been given in this form.

4. Defendant Wolfe's tendered instruction No. 6, regarding the statute of limitations on plaintiff Denise Debose's claim for breach of fiduciary duty.

Defendant Wolfe asserts that the trial court committed error in denying his Motion for New Trial with Respect to Jury Instructions, for reasons set forth in his Post-trial Motions.

P. Whether the trial court committed reversible error in upholding the jury's award of future damages, when there was insufficient evidence to support that award.

Q. Whether the trial court committed reversible error in failing to order a new trial based on excessiveness of damages.

R. Whether the trial court committed reversible error in failing to declare a mistrial or requiring a new trial because of the effect of Juror Bechter's communications with other jurors. Juror Bechter's daughter was raped over twenty years ago. Juror Bechter failed to disclose this on voir dire, and was seated as a juror. She then communicated with other jurors regarding this incident. Those other jurors encouraged her to disclose this to the court, and when she did so she was removed from the jury. Defendant Wolfe asserts that Juror Bechter's communications with other jurors created a reasonable possibility of prejudice, which made it necessary to

declare a mistrial at that point. Likewise, this juror's initial concealment of this information during voir dire, by itself warranted declaration of a mistrial, since the jury had already been empaneled, and it was reversible error to try to deal with this simply by removing her from the jury and using an alternate.

S. Whether the trial court committed reversible error in failing to order a new trial based on the fact that the jury empaneled included a person ineligible to serve as a juror in the City and County of Denver, in refusing to conduct a factual hearing regarding this issue, and in depriving the defendants of the opportunity to depose Juror Lund. There was evidence that Juror Lund was a non-resident of the City and County of Denver at the time of the trial, and thus, ineligible for jury service. Defendant Wolfe contends it was error for the trial court to deny his Post-trial Motion for New Trial Regarding Juror Lund.

T. Whether the trial court committed reversible error in providing substantive responses to several questions submitted by the jury, rather than direct them to read and follow the instructions given to them. If the instructions given required amplification, then they were inadequate, and it was reversible error to submit the case to the jury on such inadequate instructions. If the instructions given required no amplification, then it was error for the court to give gratuitous addition instructions during deliberations.

TRANSCRIPTS (pursuant to Rule 3(d)(4), C.A.R.)

Transcripts of all pre-trial, trial, and post-trial proceedings will be required for this appeal. The complete transcript is expected to be between 2,000 and 3,000 pages long. The court reporter in Courtroom 2 of the Denver District Court is Deborah Stafford.

PRE-ARGUMENT CONFERENCE (pursuant to rule 3(d)(5), C.A.R.)

A pre-argument conference is not requested.

COUNSEL (pursuant to Rule 3(d)(6), C.A.R.)

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(Counsel for defendant Bear Valley Church of Christ is filing a parallel Notice of Appeal.)

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APPENDIX (pursuant to Rule 3(d)(7), C.A.R.)

Attached hereto is an Appendix containing the following documents:

A. A copy of the "Court's Order Re: Judgment (Trial to Jury)," dated August 4, 1992.

B. A copy of Defendant Wolfe's Post-trial Motions.

C. A copy of the "Court's Order Re: Defendant Wolfe's Post-trial Motions," dated October 22, 1992.

D. A copy of Defendant Bear Valley Church of Christ, Motion for New Trial, and/or Judgment Notwithstanding the Verdict, and/or Amendment of Judgment and/or for Remittitur (incorporated by reference on page 34 of Defendant Wolfe's Post-trial Motions).

E. A copy of the "Court's Order Re: Defendant Bear Valley Church of Christ's Post-trial Motions," dated October 22, 1992.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By /s/ James D. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal on Behalf of Defendant Homer Wolfe have been served on attorneys of record in the trial court by depositing same in the United States mail, this 4th day of December, 1992, addressed as follows:

Ms. Joyce Seelen
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
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Mr. Neil Quigley
Quigley & Bruce
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950 South Cherry Street
Denver, Colorado 80222

I further hereby certify that copies of the foregoing Notice of Appeal on Behalf of Defendant Homer Wolfe have been hand-delivered to the Denver District Court this 4th day of December, 1992, by hand-delivering same to the Clerk of Court, Denver District Court, City and County Building, 1437 Bannock Street, Denver, Colorado 80202.

/s/ James D. Johnson

APPENDIX P

COURT OF APPEALS, STATE OF COLORADO

Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

AMENDED OPENING BRIEF OF APPELLANT HOMER WOLFE

BEAR VALLEY CHURCH OF CHRIST,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees,

and

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern III, District Judge

APPELLANT (Party initiating this Appeal): Homer Wolfe

TRIAL COURT CASE NO.: 91-CV-4346

Counsel for Defendant-Appellant Homer Wolfe:

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IV. ARGUMENT

A. THE PLAINTIFFS' CLAIMS IN THIS CASE AMOUNTED TO CLAIMS FOR CLERGY MALPRACTICE, WHICH ARE BARRED BY THE COLORADO SUPREME COURT'S DECISION IN *DESTEFANO v. GRABRIAN*.

In *Destefano v. Grabrian*, 763 P.2d 275 (Colo.1988), the Colorado Supreme Court declined to recognize a cause of action for "clergy malpractice." In subsection III.C. of the central opinion, Justice Erickson stated as follows:

> "Since Grabrian is a Catholic priest, the malpractice claim alleged by Edna falls within the realm of 'clergy malpractice.' To date, no court has acknowledged the existence of such a tort. Since the claim for clergy malpractice is not supported by precedent and raises serious first amendment issues, we have concluded that Edna's second claim for relief was properly dismissed. We do not recognize the claim of 'clergy malpractice.' "

Id. at 285. In a concurring opinion, Justice Quinn similarly stated:

> "[R]ecognizing the so-called tort of 'clergy malpractice' would not only contravene the legislative decision to exempt religious ministers from compliance with the provisions of the statutory scheme . . . , but also would derogate the constitutionally protected interest of ministers, priests, and rabbis to conduct bona fide marriage counseling as guaranteed by the Free Exercise Clause of the First Amendment."

Id. at 289. In of the majority opinion, Justice Erickson recognized that a claim for professional negligence is a claim for malpractice, and further that "Malpractice consists of any professional misconduct, unreasonable *lack of skill* or fidelity *in* professional or *fiduciary duties*, evil practice, or illegal or immoral conduct." Id. at 285. Thus, the court said that malpractice extends to unreasonable lack of skill or fidelity in performing *fiduciary duties*. That is precisely the nature of the allegations in the First Claim for Relief in the DeBoses' Complaint against defendant Homer Wolfe. Although the claim is denominated as a claim for breach of fiduciary duty, it amounted to a claim for clergy malpractice.

It is true that the court in *Destefano v. Grabrian* did allow a claim for breach of fiduciary duty to stand against Father Grabrian. To understand the limits of that claim, however, it is necessary to focus on the facts of the case, and to recognize the way that the sections of the opinion fit together.

First, it cannot be overemphasized that Father Dennis Grabrian and the Diocese of Colorado Springs apparently made admissions from which the Supreme Court concluded that Father Grabrian's conduct fell outside the

practices and beliefs of the Roman Catholic Church, so that no First Amendment protection was available. Id. at 284. There is no comparable admission here. Quite the contrary, Homer Wolfe has consistently said that his actions were legitimate manifestations of pastoral counseling. Although there were concurrences and dissents on other issues, there was no dissent in *Destefano v. Grabrian* from the central holding that "we do not recognize the claim of 'clergy malpractice.' " Id. at 285.

In addition, it is critically important to reconcile Section III.B. in the majority opinion (allowing claims against Father Grabrian for breach of fiduciary duty and outrageous conduct) with Section III.C. (rejecting claims for clergy malpractice, including such claims styled as involving lack of skill in performing fiduciary duties). It was the extreme nature of Father Grabrian's alleged conduct which sustained the claims for breach of fiduciary duty and outrageous conduct under those circumstances.[1] By its terms, the "Grabrian" rule applies only where a clergyman engages in sexual relations with a counselee.[2]

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[1] In subsection III.B. of the majority opinion, Justice Erickson stated that, "If the allegations are true, it is clear to us that Grabrian breached his duty and obligation when he had *sexual intercourse* with Edna." Id. at 284 [emphasis added]. In his concurring opinion, Justice Quinn stated that, "When, as here alleged, the priest abuses his position of trust *by engaging in sexual relations* with the counselee, the torts of breach of fiduciary duty and outrageous conduct are adequate to the task of providing the counselee with an effective remedy for this type of *egregious misconduct*." Id. at 289 [emphasis added].

[2] In fact, the Grabrian rule technically would seem to apply only when the clergyman's actions violate his religious vows.

Under the facts of this case, that element is conspicuously missing. Mr. Wolfe's alleged conduct is different not merely in degree, but different in *kind*, from the conduct of Father Grabrian in *Destefano v. Grabrian*. There were no allegations that Homer Wolfe engaged in sexual relations with this counselee. In fact, there are no allegations of conduct by Mr. Wolfe which would be fundamentally inconsistent with the counseling relationship. The DeBoses and their experts may be critical of the techniques employed by Wolfe in the course of pastoral counseling, but those amount to allegations of clergy malpractice. If Father Grabrian had been sued for using

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On its face, this suggests that the Grabrian rule imposes civil liability based on that violation of religious vows. Counsel for the appellant would have understood even the inquiry into the tenets of a defendant's religion to be impermissible, let alone the imposition of civil liability based on violation of those tenets. See *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Wolf v. Rose Hill Cemetery Association*, 832 P.2d 1007 (Colo.App. 1991), cert.den. (1992); and *Bernson v. Koch*, 35 Colo.App. 257, 534 P.2d 334 (1975). In the final analysis, defense counsel submit that the liability imposed on Father Grabrian must be understood *not* as liability imposed because of his violation of the religious vow of celibacy (or the vow of chastity), but on an across-the-board rule that pastoral counselors of whatever faith may not engage in sexual relations with counselees. From that perspective, it is the extreme nature of Father Grabrian's conduct, as viewed not by the standards set by the Roman Catholic Church but by the standards set by American society, which warrants imposition of liability. Taking that view, a Protestant minister, a Jewish rabbi, a Buddhist priest, or the founder of the Branch Davidian cult would all be subject to the same liability, if he engaged in that one form of extreme conduct of which society categorically disapproves.

ineffectual, improper, or even counterproductive counseling techniques, Section III.C. of the *Destefano v. Grabrian* opinion would have been controlling. Under those circumstances, there would have been no claim available for breach of fiduciary duty or outrageous conduct.[3] In this regard, the case of *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D.N.Y. 1991), is instructive. There the court rejected the

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[3] It is clear that, because of the amorphous nature of the cause of action for outrageous conduct, the trial court has a much more active function in screening outrageous conduct claims than it would have in other types of cases. In *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988), the Colorado Supreme Court held that it is for the court to determine, in the first instance, whether the conduct is sufficiently "extreme and outrageous" to support an outrageous conduct claim. If the conduct alleged or proven is not sufficient to create a jury question, then the outrageous conduct claim should be dismissed. This affirmed a long line of decisions to that effect by the Colorado Court of Appeals, which started with *Blackwell v. Del Bosco*, 35 Colo.App. 399, 536 P.2d 838 (1975), aff'd on other grounds, 191 Colo. 344, 558 P.2d 563 (1976). Therefore, the court is called upon to determine, in the first instance, whether the conduct alleged could create a jury question regarding outrageous conduct. When the Supreme Court ruled that Father Grabrian could be sued for outrageous conduct, it clearly was not saying that a claim for clergy malpractice could still be brought, as long as the claim masqueraded as an outrageous conduct claim. Father Grabrian's alleged conduct was obviously perceived as being so extreme as to be entirely outside the counseling relationship. Therefore, the court's ruling that an outrageous conduct claim was available against Father Grabrian must be understood to stem from the very extreme nature of his conduct, which was considered to be objectively beyond the scope of the counseling relationship. However, that does not mean that a clergy malpractice claim can survive under the guise of an outrageous conduct claim, in the absence of that extreme conduct.

effort to save what amounted to a clergy malpractice claim by sailing the claim under the flag of breach of fiduciary duty: "Schmidt's fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice." 321 F.Supp. at 326. See, also, *Dausch v. Ryske*, 1993 WL 34873 (N.D.Ill. 1993). [This is a recent federal district court decision. A copy is attached for the court's convenient review as Appendix D.]

Before a plaintiff can *ever* have a claim for breach of fiduciary duty, there must be a fiduciary relationship, and the plaintiffs' damages must arise from a breach of a fiduciary duty associated with that relationship.[4] Therefore, to reconcile Sections III.B. and III.C. in the majority

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[4] This may indicate a flaw in the analysis of *Destefano v. Grabrian*. Because a claim for breach of fiduciary duty must be traceable to the fiduciary relationship, it is difficult to conceptualize how such a claim can be triggered by conduct outside that relationship. For example, if the fiduciary accidentally runs over his counselee, he may be liable to the counselee for negligence in the operation of his car, but that is not a manifestation of fiduciary duty. Similarly, if sexual relations between a counselor and a counselee are genuinely perceived as being entirely beyond and outside the limits of the fiduciary relationship, there may be some form of civil liability imposed (perhaps for the civil tort of battery), but not forbreach of fiduciary duty. On the other hand, if this is treated as abreach of fiduciary duty, the link to the pastoral courseling relationship actually has not been severed. The Colorado Supreme Court may yet reconsider this approach, or the U.S. Supreme Court ultimately may not accept this approach. However, the analysis in the text proceeds on the assumption that a claim for breach of fiduciary duty is available against a clergyman who engages in sexual relations with a counselee.

opinion of *Destefano v. Grabrian*, it is necessary to make some distinction as to the type of claim for breach of fiduciary duty which is barred by Section III.C. of that opinion, as a claim for clergy malpractice, and the type of claim for breach of fiduciary duty which is so extreme that it will be treated differently under Section III.B. of that opinion. The distinction must rest in the type of conduct involved. If it is necessary to produce expert testimony to establish a standard of care and to show that the defendant has deviated from that standard of care, that most definitely is an impermissible clergy malpractice claim. On the other hand, if the conduct alleged (such as having sexual relations with a counselee) is so extreme that it is objectively prohibited, then that claim may be regarded as beyond the bounds of clergy malpractice. One example of this distinction, from the area of legal malpractice, is the distinction between a claim for breach of fiduciary duty based on failure to exercise reasonable care in conducting legal research, complying with the rules of civil procedure, etc. (which would require proof of the standard of care and proof of the breach of the standard of care), as opposed to a claim for misappropriation of a client's funds (which is objectively prohibited). Both involve forms of fiduciary duty, but one is a "malpractice" claim and the other is in essence an intentional tort. Moving into the context of pastoral counseling, *Destefano v. Grabrian* held that any claim which depends on "clergy malpractice" or "negligent counseling" will not be allowed. Claims based on conduct which is objectively prohibited will be allowed, however.[5] In this case,

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[5] Another way to look at this would be to allow intentional tort claims to go forward, but not other tort claims. See *Schmidt*

the DeBoses needed voluminous standard of care evidence. [See Argument D.1., below.] These were clergy malpractice claims, regardless of the labels applied.

The importance of this threshold issue, of whether the claims against Mr. Wolfe are clergy malpractice claims, is that the Colorado Supreme Court, as the court with ultimate authority to determine the common law in Colorado, has refused to recognize a cause of action for clergy malpractice in this state. The claims against defendant Wolfe were, in reality, claims for clergy malpractice, although they were labeled as claims for breach of fiduciary duty and outrageous conduct in an effort to circumvent that central holding of *Destefano v. Grabrian*. The facts of this case simply do not parallel the facts of *Destefano v. Grabrian*, and the causes of action allowed to go forward against Father Grabrian should not be allowed to go forward against Homer Wolfe in this case.

B. ANY CLAIMS AGAINST DEFENDANT WOLFE ARISING OUT OF PASTORAL COUNSELING PROVIDED TO JOHN DEBOSE ARE BARRED BY THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The religion clauses of the First Amendment to the United States Constitution proscribe "any law respecting an establishment of religion, or prohibiting the free exercise thereof." These provisions of the Bill of Rights have

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v. Bishop, supra [claim for battery, if timely filed, might properly be brought against clergymen, but not other tort claims].

been held applicable to the states under the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939).[6] In *Destefano v. Grabrian*, the Colorado Supreme Court acknowledged that spiritual counseling may implicate these First Amendment rights. 763 P.2d at 283. The court recognized that, "If the alleged misconduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue." Id. at 284. However, because there was no assertion that the conduct in question fell within the practices or beliefs of the Roman Catholic faith, and because the conduct was, in fact, admitted to be fundamentally antithetical to Catholic doctrine, the court concluded that Father Grabrian's alleged conduct was, by definition, not an expression of a sincerely held religious belief. Id. at 284. In the case now before the court, Homer Wolfe certainly does maintain that his pastoral counseling of John Debose was an expression of sincerely held religious beliefs, and the conduct alleged in this case simply cannot be equated with the conduct alleged in *Destefano v.*

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[6] Article II, Section 4, in the Constitution of the State of Colorado, contains some comparable provisions which are to some extent comparable to those of the First Amendment. It is clear that the provisions of the state constitution must be construed so as not to restrict religious freedom to an extent greater than the U.S. constitution. *Zavilla v. Masse*, 112 Colo. 183, 147 P.2d 823 (1944). Of course, the state constitution could be interpreted as providing *broader* protection for the appellants than the federal constitution. If the court finds no protection under the First Amendment, the appellants specifically request consideration of the possible impact of these parallel state constitutional provisions.

Grabrian. The claims stated against Wolfe in this case clearly were barred by the free exercise clause. Furthermore, because of the nature of the inquiries required to entertain a claim for breach of fiduciary duty or outrageous conduct based on pastoral counseling, such claims are clearly violative of the establishment clause as well. Since these two clauses are analytically distinct, they will be analyzed separately.

B.1. ANY CLAIMS AGAINST HOMER WOLFE ARISING OUT OF PASTORAL COUNSELING SUPPLIED TO JOHN DEBOSE WOULD BE BARRED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

As recognized in *Destefano v. Grabrian*, "When the free exercise clause is raised as a defense, the threshold question is whether the conduct of the defendant is religious." Id. at 283 [citing *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)]. If the free exercise clause is triggered, the party challenging the governmental action must then show that there is a coercive effect against his practice of religion. Id. [citing *Abington Township v. Shempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)]. Upon that further showing, the individual's First Amendment rights must then be balanced against the rights of society. Applying these tests, the civil claims which the trial court allowed to go forward against Homer Wolfe clearly violate the free exercise clause, and should not have been allowed.

B.1.a. The pastoral counseling administered by Homer Wolfe to John Debose was religiously motivated.

In the case now before the court, defendant Wolfe has consistently said that his pastoral counseling of John Debose was an expression of his sincerely held religious beliefs, and he has consistently invoked the First Amendment. There certainly has been no concession that his conduct in pastoral counseling is antithetical to the beliefs and doctrine of his religion. Wolfe testified that he has never tried to provide secular counseling, that his counseling has always been religiously-oriented. See Vol. 13, 11:8-15:10. (These pages are grouped in Appendix B, for the court's convenience.) In their testimony, the DeBoses' experts actually acknowledged the unique nature of pastoral counseling, because of its roots in religious beliefs and institutions. See the testimony of Reverend Marie Fortune, Vol. 11, 16:8-20, and the testimony of Randy Sims, Vol. 11, 72:14-16. These witnesses wanted to curb the use and scope of pastoral counseling because of perceived dangers associated with its spiritual underpinnings, but the fact remains that even they acknowledged those spiritual underpinnings.

One of the criticisms leveled by the plaintiffs' lay experts was that they consider it inappropriate to touch a counselee. This highlights a fundamental distinction between pastoral counseling and secular counseling. In explaining his pastoral counseling philosophies regarding hugging and massage, Mr. Wolfe stated that:

> "[Touching] is one of the best ways to communicate – of communicating your care and concern for the other person. We have been created in

the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody – say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're important, you're somebody, you have value, and that's something everybody needs."

Vol. 13, 15:13-23. He did not intend anything sexual by this touching, however. Vol. 13, 16:8, 14:25. With respect to massage, he testified as follows:

"Q. Did you sometimes – well, I think I already established you sometimes did use massage in connection with counseling. When did you start using that practice? How did it come to your attention that it could be useful?

"A. I guess it would be as my own two sons were growing up in their preadolescent and adolescent years, that they had normal problems at that age, unable to communicate and perhaps not being able to as well as they would like; and massaging their backs and legs in order to relax them, it helped a great deal in our communication. We became very close, and we're still very close today. They grew up to be fine Christian young men.

"Q. Now, when you – after that experience in your own family, when – how did it come about that you began to use it occasionally in connection with counseling?

"A. How did it come about?

"Q. That you began to use it sometime in counseling people?

"A. Oh. Well, I find that people, were uptight and a little bit fearful of what is going on. People are, at first, in counseling somewhat fearful. It helps to relax them and helps them to communicate.

"Q. In other words, if a person in counseling seems to be having trouble telling you what's wrong or going about what's needed in order to help themselves and have you help them, you have found that on some occasions massage will cause them to relax and communicate better?

"A. Yes, sir, that's correct.

Vol. 13, 16:9-17:11.

Another criticism leveled by these lay practitioners was that the counseling technique Wolfe employed with Steven Magyar, which involved observing and praising body parts to overcome an unhealthy sense of shame, was improper. It is troubling to note that the court's rulings allowed the plaintiffs' attorney and experts to focus so much attention on this point, when there was no allegation that this technique was ever employed with John DeBose. Wolfe did explain that this technique had religious underpinning, however:

"And I was not – the techniques that I used were not 100 percent based on the Bible. What I'm trying to say is that there are biblical principles involved here concerning humanity, human sexuality, and self-image emotional problems that people have, and its rather complex.

. . . .

> "I didn't learn the principle from that, which is in Scripture. I saw that as fitting in the Scripture."

Vol. 9, 74:4-9, 74:17-18.

These lay practitioners were also critical of the counseling technique Wolfe employed with Wade Wright, which involved inspection of an adolescent counselee's circumcision, to assure him that the appearance of his male organ was not abnormal. Again, it is troubling to focus so much attention on this point, when there was no indication that this technique was ever employed with John DeBose. However, Wolfe did explain the religious underpinning of this technique. Vol. 13, 53:7-54:5.

In counseling adolescents, it is sometimes necessary to determine what is actually troubling a particular counselee, which is not always easy. Vol. 13, 18:6-12. Adolescents generally are not preoccupied by the nuances of scriptural interpretation, but about the realities of coming of age, socially, sexually, and emotionally. Mr. Wolfe's pastoral counseling was administered with a pragmatic understanding of that practical reality, but it was nevertheless pastoral counseling. Mr. Wolfe expressly stated that he was not a trained psychologist (Vol. 9, 84:5-8), although he had made an effort to familiarize himself with the literature of psychology to assist him in his role as a pastoral counselor, and that his role as a pastoral counselor was to bring individuals closer to God:

> "That was my entire basic goal, to get people back to God, in communication with him, living with him and for him; and all the counseling I did was designed to do that. And, of course, the only ways that god speaks – letting him be

> responsible, let him keep his promises, learning our – helping other people to learn how to open their hearts."

[Vol. 13, 42:21-43:2.] It is obviously true that not all the problems Mr. Wolfe confronted could be solved by quoting scripture, but pastoral counseling extends beyond that which is directly targeted at meeting spiritual needs. As recognized in Footnote 10 of *Destefano v. Grabrian*:

> "[C]ounseling by members of the clergy is frequently directed to matters that are essentially secular in nature. 'Family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious aspects of a spiritual counselor's activities.' Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 Rutgers L.J. 419, 437 (1988). But see Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal.W.L.Rev. 507, 516 (1983) (pastoral counseling is a religious, not secular, activity in which '[i]t is impossible to separate the 'cure of the minds' from the 'cure of the souls' '); Comment, *Clergy Malpractice; Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137, 139 (1986) ('While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective.')."

Id. at 285.

Mr. Wolfe does maintain that the pastoral counseling he administered was consistent with the tenets of the Church of Christ, and there is certainly nothing in this

case comparable to the situation presented in *Destefano v. Grabrian*, where Father Grabrian's alleged conduct was directly *contrary* to his vows. However, in the final analysis, it makes no difference whether his pastoral counseling philosophies are central to official doctrine of the Church of Christ. Established and idiosyncratic beliefs are accorded equal protection under the First Amendment. As the Supreme Court noted in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 1604, 108 L.Ed.2d 876 (1990):

> "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' *United States v. Lee*, 455 U.S. 252 at 263 n.2, 102 S.Ct. 1051 at 1058 n.2, 87 L.Ed. 1628 (1943) (STEVENS, J., concurring). As we reaffirmed only last Term, '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.' *Hernandez v. Commissioner*, 490 U.S. at 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular

> belief in a religion or the plausibility of a religious claim. See, e.g., *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707 at 716, 101 S.Ct. at 1425, 67 L.Ed.2d 624 (1981); *Presbyterian Church v. Hull Church*, 393 U.S. 440 at 450, 89 S.Ct. 601 at 606-07, 21 L.Ed.2d 658; *Jones v. Wolf*, 443 U.S. 595, 602-606, 99 S.Ct. 3020, 3024-3027, 61 L.Ed.2d 775 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87, 64 S.Ct. 882, 885-87, 88 L.Ed. 1148 (1944)."

Some persons hearing of Wolfe's pastoral counseling philosophies and techniques might consider them eccentric or even wrong. However, the First Amendment absolutely forbids any civil court from conducting an inquisition regarding the correctness or even the reasonableness of a defendant's sincerely held religious beliefs. As Justice Douglas stated in *United States v. Ballard, supra*:

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.
>
> ". . . . The religious views espoused by respondents may seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

64 S.Ct. at 885-886 [citation omitted]. In that case, the defendants were charged with mail fraud, based on sale of religious materials through the mail which they represented to be divinely inspired. The defendants made representations that, because of their high spiritual attainments, Saint Germain and later Jesus himself had come down and dictated these materials to them, and that they shook hands with Jesus during his visit. The Supreme Court ruled that the defendants could be liable if they contrived this story to defraud members of the public, without believing what they said, but that the First Amendment prohibited any scrutiny of the correctness or reasonableness of the religious doctrines or beliefs themselves.

Judged by that standard, the pastoral counseling provided by Homer Wolfe to John DeBose was certainly rooted in religious beliefs, and no court may conduct an inquisition challenging the correctness or reasonableness of those beliefs.[7] The *Ballard* case does indicate that, in a

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[7] To dovetail this establishment clause analysis with the analysis of *Destefano v. Grabrian*, above, it should be noted that, where a clergyman is accused of engaging in sexual relations with a counselee, courts exhibit a strong tendency to say that such conduct by its nature falls outside the protection of the First Amendment. See *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (Ohio 1988), and *Milla v. Tamayo*, 232 Cal.Rptr. 685, 690, 187 Cal.App.3d 1453 (1986). The Colorado Supreme Court came close to taking that position in *Destefano v. Grabrian*, although the court technically stated only that it was not necessary to consider the ramifications of the First Amendment there was no assertion that the defendants' conduct was religiously motivated. Since there is as yet no U.S. Supreme Court decision on this point, defense counsel do not necessarily

case where the court concedes that the free exercise clause has been triggered, there can nevertheless be a factual question as to whether the defendant sincerely holds the stated religious belief. On the state of this record, there was no genuine issue as to sincerity, and this entire threshold issue should have been determined in favor of the defendant as a matter of law. However, if there was a legitimate question as to the sincerity of Mr. Wolfe's religious beliefs, that was an issue to be determined by the jury as the finder of fact, not an issue to be determined by the trial judge. Wolfe did tender appropriate instructions to submit the factual issue of sincerity of the religious belief to the jury, if the trial court concluded that there was a dispute in the evidence which made that a jury question. [Vol. 2, pp. 466-467.] However, the trial court disregarded the First Amendment entirely. The jury should at *least* have been instructed that Mr. Wolfe's actions were constitutionally protected by the free exercise clause if his religious beliefs were sincerely held.

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concede that there is a type of conduct which by its nature automatically falls outside the First Amendment. However, it clearly is not necessary to decide that hard question in *this* case, because *this* case does not involve that type of extreme facts. The conduct for which Wolfe has been liable all clearly fell within the context of pastoral counseling. There was no allegation of any sexual relations between Wolfe and John DeBose. Under these circumstances the protection of the First Amendment was certainly triggered.

B.1.b. These civil claims for breach of fiduciary duty and outrageous conduct have a chilling effect on Homer Wolfe's free exercise of his religious beliefs.

Allowing claims for breach of fiduciary duty and outrageous conduct of the type filed against Wolfe by the DeBoses would necessarily have a chilling effect on Wolfe's free exercise of his religious beliefs. The central purpose of this lawsuit is to subject Mr. Wolfe (and BVCC) to liability based on the pastoral counseling provided to John DeBose.[8] In some abstract sense, it may be

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[8] Certainly the idea behind the expert testimony presented regarding the standard of care for pastoral counseling is that, by receiving this type of evidence, a civil court can determine what is acceptable in pastoral counseling and what is not. Reverend Marie Fortune drew a boundary line which prevents any ordinary clergyman from providing "in-depth assistance to someone around issues which can be clinically diagnosed" [Vol. 11, 44:6-14], which may effectively eliminate pastoral counseling for many individuals who need it most. By that view, a member of some particular faith, who may be in dire need of counseling and may wish to seek spiritual counseling from a clergyman within his faith, must instead receive secular counseling or forego counseling altogether, because a civil court may impose liability on the clergyman for providing counseling which does not meet Reverend Fortune's standard. See *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988), cert.den., 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989). Indeed, no clergyman could ever know with certainty where a retained expert might later draw the line. If there was some pastoral counseling activity Marie Fortune was not prepared to indict, then the plaintiff's attorney would simply need to find some other "expert" willing to apply even stricter standards of care to the conduct of pastoral counseling. That is already an accepted fact of life in

possible to argue that claims for compensatory damages are not primarily intended to perform a behavior-shaping function, but to compensate the plaintiff for his injuries. However, the practical reality is that exposure to liability for compensatory damages obviously has its own chilling effect on the free exercise of religion. As stated in *Schmidt v. Bishop, supra*, "Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of a religious denomination. . . . " [779 F.Supp. at 332.] Furthermore, the DeBoses asked for and received punitive damages under C.R.S. § 13-21-102, the express purpose of which is not to compensate the plaintiff, but to punish the defendant *and* to deter other from similar conduct in the future. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980); *Mince v. Butters*, 200 Colo. 501, 616 P.2d 127 (1980); *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974). Therefore, it is impossible to conceive of the claims brought in this case as somehow *not* having a coercive effect on the defendants' practice of their religion. Homer Wolfe happens to be the individual defendant in this particular case, but every clergyman in America is at risk if this type of claim is allowed.

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malpractice claims against secular professionals, and that is what the DeBoses are trying to import into this area which should be governed by the First Amendment.

B.1.c. These civil claims for breach of fiduciary duty and outrageous conduct are barred by the free exercise clause of the First Amendment.

Once the First Amendment is implicated, longstanding constitutional doctrine would require the demonstration of a compelling state interest to justify interference with the defendant's free exercise of his religion, and would further require that the least intrusive means be employed to protect that compelling state interest. See *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Applying that test, there clearly is no compelling state interest which justifies this interference with the practice of religion. With respect to the pastoral counseling he provided to John Debose, defendant Wolfe submits that *no* governmental interference can be justified in this case.

It is acknowledged that some conduct by a clergyman in the context of pastoral counseling may be considered beyond the pale. However, to the extent that there may be conduct in the context of pastoral counseling which is subject to regulation by the state, a civil cause of action which depends on a subjective standard of conduct simply cannot be considered the least intrusive means of advancing the compelling state interest. In this case, the trial court suggested the flogging of a counselee by a pastoral counselor as one example of conduct so extreme as to be subject to regulation by the state. [Vol. 6, 32:10-16.] In that hypothetical situation, the appropriate means of regulating that conduct would most likely be the enforcement of a facially neutral *criminal* statute of

general application. See *Schmidt v. Bishop, supra,* recognizing that the appropriate way of regulating conduct of a clergyman which society cannot tolerate is enforcement of criminal sanctions. In his opinion for the court in *Employment Division v. Smith, supra,* Justice Scalia recognized that the enforcement of a facially neutral criminal statute of general application does not offend the religion clauses of the First Amendment, even though the defendant maintains that his particular conduct was religiously motivated. If there is no facially neutral statute of general application which can be applied to support the prosecution of a pastoral counselor, that seems like a strong indication that the regulation of the conduct in question does not involve a compelling state interest. On the other hand, if there is a criminal statute available, that is the appropriate "least intrusive means" to vindicate the state's interest.

It is conceivable that, in a case involving harmful or offensive physical contact by a pastoral counselor with a counselee, a *civil* action for battery might be accepted as the least intrusive means of dealing with that conduct, especially if there was no criminal statute applicable under the particular circumstances. In *Schmidt v. Bishop, supra,* the court did state that "The facts alleged in the complaint support clearly an action for a battery or some similar intentional tort. . . . " 779 F.Supp. at 324. Even if John DeBose had a colorable civil claim for battery, however, opening the door to that claim would not open the door to the fiduciary duty and outrageous conduct claims actually stated in this case.

Appellant Wolfe acknowledges that, in *Employment Division v. Smith, supra,* Justice Scalia's opinion for the

court did call into question the use of the compelling state interest test in some or all cases dealing with the free exercise clause. However, the central holding necessary to decide that case was only that, where there is a facially neutral criminal statute which proscribes certain conduct, that statute may be enforced even where it is being enforced against a person who claims that his prohibited conduct was religiously motivated, and that no balancing of the rights of the individual versus the interests of the state is required in that situation. The broader language of Justice Scalia's majority opinion in *Employment Division v. Smith* may be dictum, since the result of that case is fully supported by a narrow holding that the compelling state interest test does not have to be met where the state action appears in the form of a facially neutral criminal statute which is neutrally applied. In *DeBose v. Wolfe*, we are not dealing with criminal sanctions in any way, and this interpretation of the *Smith* case would leave the compelling state interest test available in this case. Applying that balancing test, there is no compelling state interest to support imposition of liability on Mr. Wolfe, and if some compelling state interest was implicated, this type of subjective tort liability would not be the least intrusive means to vindicate that interest.

However, even if the *Smith* case is understood to entirely eviscerate the compelling state interest test in free exercise cases, it is still necessary for the court to employ *some* mechanism to determine whether the interests of the state are paramount over the First Amendment rights of the individual in any particular case. Otherwise, religious freedom under the First Amendment would be a

legal fiction. No matter what level of interest is asserted by the state, Mr. Wolfe's conduct did not rise to a level which would justify abrogation of his First Amendment right to the free exercise of religion. By condoning this witch hunt regarding methods of pastoral counseling, the trial court has directly infringed Wolfe's free exercise of religion, under circumstances where his conduct involved no criminality and no conduct involving overt sexual gratification (such as that involved in *Destefano v. Grabrian*), and which possessed no other characteristics justifying state intervention.

B.2. ANY CLAIMS AGAINST HOMER WOLFE ARISING OUT OF PASTORAL COUNSELING SUPPLIED TO JOHN DEBOSE WOULD BE BARRED BY THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The other religion clause in the First Amendment is the establishment clause. In *Engle v. Vitale*, 370 U.S. 421, 431-432, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), Justice Black summarized the function of the establishment clause as follows:

> "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of the Constitution that religion is too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), Justice Burger recognized that the First Amendment does not merely prohibit the establishment of a state religion, but prohibits any law "respecting an establishment of religion":

> "A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[9]

The *Lemon* court formulated a 3-prong test to determine whether governmental interference with religious matters is constitutionally impermissible. The elements of

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[9] See, also, *Lee v. Weismann*, 112 S.Ct. 2649, 2656, 120 L.Ed.2d 467 (1992), holding that "the First Amendment's religion clauses mean that religious beliefs and religious expression are too precious either to be proscribed or prescribed by the state." Establishment clause cases most often involve affirmative governmental action which allegedly favors religion. However, by allowing the jury to impose liability on the defendants in this case, the court clearly offended the establishment clause. As the Supreme Court stated 50 years ago in *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

the *Lemon* test are: (1) the law must have a secular purpose; (2) the law's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the law must not foster "an excessive government entanglement with religion." In the context of pastoral counseling, any attempt to regulate the content or methodology of a religious counselor violates the *Lemon* test. See Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137 (1986). The plaintiffs' claims against Homer Wolfe fail all three prongs of the *Lemon* test, and thus, violate the establishment clause. As stated in Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept* 19 Cal. W.L. Rev. 507, 530-532 (1983) (which was cited by Justice Erickson in *Destefano v. Grabrian*):

> "C. Application of the Establishment Clause Test to the Clergy Malpractice Theory
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> "1. The Secular Purpose of a Judicial Standard of Pastoral Care is Unclear. Judicial application of a standard of care for the clergy in their pastoral counseling ministry would not stand the test of the first prong of the *Lemon* inquiry. The purpose of such a standard would appear initially to be a secular one. The state undoubtedly has an interest in enforcing standards of conduct so that wrongs may be redressed. However, the secular purpose of developing and applying a clergy malpractice standard becomes increasingly less clear when one considers the nature of pastoral counseling. The conduct to be measured in a clergy malpractice action is the application of religious ideals to the problems of life. The wrong to be redressed in such a case might best be described

as 'harm . . . on the mental and spiritual plane.' As Justice Jackson noted in his dissent in *United States v. Ballard*, these are 'precisely the thing(s) the Constitution put(s) beyond the reach' of the civil authorities. In other words, these are not matters of secular concern.

"2. The Primary Effect of a Clergy Malpractice Standard Would Not be Religiously Neutral. Applying the second prong of the *Lemon* test, it would be naive to suggest judicial application of a pastoral counseling standard of care would have a neutral effect upon religion. Without doubt, the standard would be 'a rule once laid down . . . to be followed . . . so that others now living and even those yet unborn may be affected by a decision made today.' The practical effect of such a judicial standard of conduct would be essentially similar to that of the New York statute condemned in *Kedroff* or the trial court decision reversed in *Kreshik*. It would interfere with the decisionmaking ability of a denomination's authorities and with their supervision of the sect's pastoral counselors. Development of standards or supervisory models applicable to pastoral clergy is not the role of the courts; rather, it is the role of the denominations' seminaries and training programs. Such standards must be developed within a frame-work of disciplined research and theory building, allowing innovation to add new dimensions to the process and create 'excitement, growth and learning for all involved.' Development and application of a judicial standard would hinder this innovation and restrict a sect's ability to direct and control the establishment and change of supervisory models for its clergy. Judicial enforcement of a

> standard of care also may lessen the value of pastoral counseling to those who seek it by inhibiting the intimacy on which its effectiveness depends.
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> "3. The Clergy Malpractice Theory Will Lead to Excessive Government Involvement in Religion. The third element of examination under *Lemon v. Kurtzman* is the degree of government involvement in religious affairs. Applying this test, pastoral counseling may be analogized to other religious activities closely related to it, prayer and preaching. In two cases dealing with these activities decided prior to *Lemon*, the Supreme Court was clearly concerned with the degree of state entanglement with religion. The cases suggest regulation of prayer or preaching would be excessive involvement in religion."

With respect to secular purpose, any effort to fashion a standard to support imposition of civil liability for improper pastoral counseling by its nature crosses the line, and the effect of this undertaking can hardly be neutral. With respect to excessive entanglement, it would be hard to think of a clearer example of the manner in which imposition of civil liability results in entanglement of government in religion. The appellant notes the following examples:

1. Paragraph 5 of the Amended Complaint contained the allegation that Wolfe had neither the education nor experience nor training to be providing pastoral counseling. How can the court make any determination as to requisite expertise without excessively entangling itself in matters of religion? [On this point see the summary of standard of care evidence admitted by the court, set forth in Argument D.1., below.]

2. In interrogatories, the plaintiffs were asked to state the basis of their alleged fiduciary relationship with BVCC. They responded by citing the Old Testament (Hebrews 13:17). [Vol. 3, p. 800.] Allowing a civil suit to proceed from that premise obviously produces entanglement with religion.

3. At trial, the DeBoses were allowed to call an expert witness in the field of *theology*, Reverend Marie Fortune, upon the trial court's ruling that "she's got a level of education, training, and experience which would be of benefit to the jury in evaluating and determining the issues presented by this case." Vol. 11, 11:7-10, 13:2-7. There can hardly be a more overt indication that the court is crossing the line into matters of theology than the fact that the court regards a theologian's testimony as helpful to the jury in deciding the issues in the case.

4. It is also important to note that Reverend Fortune was not a minister of the Church of Christ, with which the Bear Valley Church of Christ was affiliated, but a minister of the United Church of Christ, a distinct denomination not affiliated with the Church of Christ or BVCC in spite of the similarity of the names. Vol. 11, 11:16-22. This placed a civil court in the position of giving an adherent of one religious denomination a platform to criticize another denomination. Reverend Fortune opined that Homer Wolfe was not qualified to provide pastoral counseling. Vol. 11, 29:13-20. She also testified that "there was no supervision of Mr. Wolfe by anyone qualified to supervise the work that he was doing." Vol. 11, 29:3-4.[10]

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[10] Bear Valley Church of Christ is represented by separate counsel, and filed a separate appeal. The two appeals have been consolidated, but the positions of the appellants are legally distinct, and they are filing separate briefs. The application of

5. Even more ironically, the trial court allowed a *lay* psychologist, Randy Sims, to testify that there was no *biblical* basis for any touching which Homer Wolfe employed in the scope of his pastoral counseling. Vol. 11, 80:6-8.

6. Aside from expert testimony in the field of theology, the court also allowed the DeBoses to call lay experts in the fields of psychiatry, psychology, and psychotherapy, all of whom were permitted to provide their lay opinions as to appropriate standards of care governing spiritual counseling provided by a clergyman. [See Argument D.1, below.] Having given his expert opinion as to the lack of a satisfactory biblical justification for Wolfe's pastoral counseling philosophies and techniques, Randy Sims, a lay psychologist, testified that under the "current law in psychological ethics" Mr. Wolfe's touching of a counselee in the context of pastoral counseling was "wrong" and "highly inadvisable." Vol. 11, 72:2-8. Even Reverend Fortune, the expert theologian, seemed inclined to apply standards of "professional ethics" to judging spiritual counseling. Vol. 11, 39:1.

7. Plaintiffs' counsel was also permitted to ask Reverend Fortune about the "spiritual impacts" she has seen "in these types of cases" [Vol. 11, 25:20-21], and Reverend Fortune responded that: "[T]here's a sense that I hear from many victims that not only was I betrayed by the church, but I was betrayed by God, and there's a profound loss that comes with it. Again, if I can't trust this person who represents God, can I trust

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the religion clauses of the First Amendment to claims against BVCC will be addressed in that appellant's brief. Nevertheless, the full extent of the entanglement produced in this case can only be appreciated by looking at all these manifestations together.

God? Is God even there for me? Because if God was there, how could this happen? There are many, many spiritual issues that people present with as a result of this experience." Vol. 11, 26:2-9. By receiving this evidence, the court was tacitly allowing the jury to award civil damages for this "spiritual impact," which should certainly be a matter of purely ecclesiastical jurisdiction. Moreover, when it came time to give instructions as to the applicable law, the trial court explicitly instructed the jury that it could award for "loss of faith."[11] Instruction No. 38, Vol. 2, p. 522.

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[11] This was the instruction regarding the damages recoverable by Denise DeBose for negligent hiring and supervision or breach of fiduciary duty. It is interesting to note that, although it was actually John DeBose who would have sustained this "spiritual impact," the court did not instruct on "loss of faith" as an element of his damages. See Instruction 39, Vol. 2, p. 523. This indicates that the trial court was making a value judgment, based on the plaintiffs' testimony, as to which of them had made a prima facie case for "spiritual injury," and that John DeBose himself did not qualify. This created a strange entanglement for a civil court in spiritual matters.

It also seems ironic that, apparently because the court perceived itself as redressing "spiritual injuries," it permitted Denise DeBose to recover non-economic damages on account of her son's purported injury. Under C.J.I. Civil Instruction 6:3, Denise DeBose should only have been allowed to recover consequential economic damages she sustained as a result of the direct injury to her son (such as treatment expenses). She should only have been allowed to recover non-economic damages (such as for her own emotional distress) if she was in the purported "zone of danger," and then only if she could show physical manifestations or mental illness resulting from the emotional distress. *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978); *Millican v. Wolfe*, 701 P.2d 107 (Colo. App. 1985), cert. dismissed 726 P.2d 647 (Colo. 1986); *James v. Harris*, 729 P.2d 986 (Colo. App. 1986); *Kimmelman v. City of Colorado Springs*, 775 P.2d 51 (Colo. App. 1988). She clearly was unable to meet those criteria.

8. In a similar vein, Reverend Fortune also analogized the "rage" sometimes experienced by persons such as the DeBoses to "the kind of anger that Jesus showed in the temple when he went there and found out that the temple was being misused." Vol. 11, 27:1-3. One useful litmus test of excessive entanglement might be that, if a claim needs to be described by biblical analogy, entanglement is occurring.

By allowing the plaintiffs' claims to go forward, the court has effectively established a short list of safe religious practices, indicating that it may punish any deviation from that list. This violates the establishment clause. This clearly created a situation where this civil court, by the experts it allowed to testify and the testimony it allowed them to give concerning appropriate standards of care for pastoral counseling was impermissibly prescribing "what shall be orthodox in . . . religion." [See *West Va. St. Bd. of Educ. v. Barnette, supra.* As the court stated in *Schmidt v. Bishop, supra* at 328:

> "This Court agrees with Nally [v. Grace Community Church of the Valley, *supra*], and regards the unconstitutionality as more than possible. It is real. . . . Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court

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Nevertheless, it appears the trial court granted Denise DeBose a waiver from the rule generally applied in civil cases, allowing her to recover for "loss of faith" stemming from her son's alleged injuries.

> and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion."

If anything, holding pastoral counselors to a secular standard, produces an even clearer constitutional violation. As stated in *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, another one of the law review comments cited by Justice Erickson in *Destefano v. Grabrian*:

> "As Rabbi Ben Zion Bergman notes, '[t]he same level of competence and professional knowledge cannot be expected from the clergyman as can be expected from the psychiatrist, whose education and training is more intensively specialized.' Since the training of the clergy varies from that of licensed psychologists, so must the standard of care.
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> "In order to determine if a psychiatrist has violated the standard of care, comparisons are made between the alleged offender and established therapists, focusing on fundamental techniques and principles. However, since members of the clergy often do not follow conventional secular counseling models or practice similar techniques, the proposed standard breaks down. The vast diversity within the religious community makes a comparison of accepted religious techniques virtually impossible, even to the point of identifying an acceptable standard. Since the fundamental concepts of the clergyman-counselor are foundationally religious in

> nature, the courts cannot scrutinize their validity without facing constitutional bars. Consequently, a secular standard cannot be imposed because of the inherent difficulty in evaluating an alleged offender's conduct using secular criteria *and* because the content and methodology are beyond the scope of judicial review."

Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L. Rev. 137, 152 (1986).

A valid and neutral criminal law of general applicability may pass the *Lemon* test, and the same may be said of an intentional tort claim which involves an objective standard. The Missouri Supreme Court seems to have drawn the line in that manner, in the case of *Hester v. Burnett*, 723 S.W.2d 544, 554 (Mo.App. 1987), holding that intentional tort claims may be brought against a clergyman, but that other claims cannot. See, also, *Schmidt v. Bishop, supra*, 779 F.Supp. at 328 ["existing laws against battery, and the criminal statute against sexual abuse if timely invoked, provide adequate protection for society's interests"]. In this case, the significance of drawing the line so as to permit traditional intentional tort claims, which involve objective standards, while not permitting other claims, which involve subjective standards, should be obvious. If Mr. Wolfe had engaged in conduct which would constitute the tort of battery, plaintiff John DeBose might have been in a position to sue Mr. Wolfe for battery. There was no effort to make such a claim, however, indicating that the elements of battery could not be established. Instead, the DeBoses resorted to a claim for breach of fiduciary duty, applying the subjective standard of what a "reasonable pastoral counselor" would or would

not have done under the circumstances, and the even vaguer standard of the nontraditional tort of "outrageous conduct," applying the subjective standard of whether a group of lay jurors feel that the defendant's religiously motivated conduct was "outrageous." That is clearly a violation of the establishment clause of the First Amendment.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By _____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Amended Opening Brief of Appellant Homer Wolfe have been served on counsel of record this 6th day of May, 1993, by hand-delivering same to the following offices:

Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
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950 South Cherry Street
Denver, Colorado 80222

APPENDIX Q

COURT OF APPEALS, STATE OF COLORADO

Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

APPELLANT WOLFE'S CITATION OF SUPPLEMENTAL AUTHORITY

BEAR VALLEY CHURCH OF CHRIST,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees

and

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees.

COMES NOW appellant Homer Wolfe, by and through his attorneys, Blunk, Johnson & Johnson, and submits this Citation of Supplemental Authority, with respect to his appeal in this case.

Defense counsel hereby cite to the court the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb, 107 Stat 1488, P.L. 103-141 (HR 1308), approved November 16, 1993. A copy of this statute, obtained through WESTLAW, is attached hereto.

The Religious Freedom Restoration Act of 1993 repudiates and legislatively overturns the U.S. Supreme Court's holding in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 1604, 108 L.Ed.2d 876 (1990). The statute restores the "compelling state interest" test in cases involving the free exercise clause of the First Amendment, as previously set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed2d 965, (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), even where the law undergoing constitutional scrutiny may be a neutral law of general applicability. By its terms, the Act applies to all federal and state law, whether statutory or otherwise, and to the implementation of that law, and the Act specifically applies whether the law in question was adopted before or after the enactment of the Religious Freedom Restoration Act of 1993. See 42 U.S.C. §2000bb-3 (a).

Defense counsel just became aware of the passage of the Religious Freedom Restoration Act of 1993 on Friday, January 28, 1994. Defense counsel question whether this Act would affect the analysis of First Amendment issues in the *DeBose v. Wolfe* appeal. The actual holding of *Employment Division v. Smith* was only that the "compelling state interest" test need not be followed where the impingement on free exercise of religion involves a facially neutral criminal statute of general applicability. In this case, we are not dealing with a criminal enactment of any kind, nor are the fiduciary duty and outrageous conduct claims against Mr. Wolfe facially neutral laws of general applicability, since their application to Mr. Wolfe depends on his status as a minister and the religious context in which pastoral counseling occurred. Therefore,

even under *Employment Division v. Smith*, the compelling state interest test might still apply to this case. If there is any question as to the applicability of the compelling state interest test, however, such questions should be put to rest by the Religious Freedom Restoration Act of 1993.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By /s/ _____
James D. Johnson,
Reg. No. 9035
Attorneys for appellant
Homer Wolfe
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Denver, Colorado 80222
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant Wolfe's Citation of Supplemental Authority have been served on counsel of record by faxing same to the offices of Holland, Seelen & Pagliuca (832-2127) and Quigley & Bruce (691-9025) at 11:45 a.m. on Monday, January 31, 1994, and also by hand-delivering hard copies of same to counsel appearing for oral argument on the afternoon of January 31, 1994.

APPENDIX R

COURT OF APPEALS, STATE OF COLORADO

Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

PETITION FOR REHEARING

BEAR VALLEY CHURCH OF CHRIST,

Defendant-Appellant,

v.

DENISE DeBOSE AND J.D.B.,

Plaintiffs-Appellees,

and

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE AND J.D.B.,

Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern, III, District Judge

APPELLATE JUDGE WHO AUTHORED THE OPINION OF THE COLORADO COURT OF APPEALS: John A. Criswell, Appellate Judge

OTHER JUDGES WHO PARTICIPATED IN THE APPELLATE RULING: Daniel M. Taubman, Appellate Judge (Specially Concurring)
Janice B. Davidson, Appellate Judge (Dissenting)

COMES NOW defendant-appellant Homer Wolfe, by and through his attorneys, Hibschweiler & Johnson, and submits the following Petition for Rehearing, pursuant to Rule 40 of the Colorado Appellate Rules.

ISSUES PRESENTED FOR REVIEW

The majority opinion largely accepted defense counsel's arguments A and C, that whatever claims may be recognized by *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and *Moses v. Diocese*, 863 P.2d 310 (Colo. 1993), cannot depend on breach of a standard of care for pastoral counseling, and that expert testimony cannot be received to define a standard of care or establish a breach thereof. The majority also agreed with argument B, to the extent of ruling that it was necessary to instruct the jury in this case regarding the significance under the First Amendment of a determination that the practices involved were religiously motivated, and to instruct the jury that the sincerity of the defendant's religious beliefs was a question for the jury to decide. However, the court did not accept the argument that the plaintiffs' claims should be categorically barred by the First Amendment, citing *Destefano* and *Moses*. The majority also accepted

argument E. to the extent of ruling that the manner in which the jury was instructed resulted in duplication of damages, although the court did not reach the larger question of whether, duplication of damages aside, the damages awarded were excessive. The court rejected defense counsel's argument D, that the trial court committed error in admitting other acts evidence at trial.

To preserve the option to apply for certiorari to the Colorado Supreme Court on the issues on which the Court of Appeals ruled unfavorably or on which the Court of Appeals did not rule, appellant Wolfe requests rehearing on the following issues:

(1) Whether the plaintiffs' claims against Homer Wolfe are categorically barred by the First Amendment to the Untied States Constitution;

(2) Whether the trial court committed reversible error in admitting other acts evidence; and

(3) Whether, aside from the issue of duplication of damages, the damages awarded to the plaintiffs were excessive.

ARGUMENT

1. Whether the Plaintiffs' Claims Against Homer Wolfe are Categorically Barred by the First Amendment to the United States Constitution

In *Destefano v. Grabrian* and *Moses v. Diocese of Colorado, supra,* the individual defendants did *not* assert that their conduct toward the plaintiff was religiously motivated or the result of a sincerely held religious belief.

Therefore, the Free Exercise Clause was not implicated when the Supreme Court evaluated those plaintiffs' claims for outrageous conduct and breach of fiduciary duty.

However, in this case, Mr. Wolfe has affirmatively stated that his pastoral counseling of plaintiff John DeBose *was* an expression of his sincerely held religious beliefs, which triggers the application of the Free Exercise Clause. Defense counsel have consistently invoked the First Amendment, contending that, once the Free Exercise Clause is implicated, the compelling state interest test is applicable, and that these claims do not hold up under that test. Where the First Amendment is implicated, claims for outrageous conduct and breach of fiduciary duty by nature allow a civil jury to pass judgment on religious beliefs and practices, applying their perceptions as to secular society's benchmark of acceptable conduct. The majority has recognized that it was reversible error to allow experts to opine about whether Mr. Wolfe's beliefs and conduct met secular and religious (even Biblical) standards. Even without that testimony, however, allowing these types of claims to go forward necessarily has an impermissible chilling effect on Mr. Wolfe's free exercise of his religious beliefs. Even if the court found a compelling state interest in allowing these claims to go forward, they should not pass constitutional muster as the least intrusive means.

Likewise, adjudication of these civil tort claims results in excessive government entanglement in religion, which offends the establishment clause. Permitting these claims to go forward is precisely the kind of government interference which is constitutionally impermissible

under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 2111, 29 L.Ed. 2d 745 (1971).

Therefore, the plaintiffs' civil claims should be barred categorically by the First Amendment. A facially neutral law of general applicability, such as a criminal assault or battery statute, which would be triggered by objective conduct, without consideration of subjective standards, might withstand constitutional scrutiny. Claims for outrageous conduct and breach of fiduciary duty by their nature involve subjective standards, however.

2. Whether the Trial Court Committed Reversible Error in Admitting Other Acts Evidence.

To give meaning to the *Spoto* test[1] and avoid the serious danger that the jury will consider the other acts evidence improperly, it is essential that the *Spoto* test be meaningfully applied by the trial court. This means that the proponent of other acts evidence should be required to articulate exactly how the evidence satisfies each element of the *Spoto* test, including articulation of precisely what Rule 404 exception is applicable, and exactly why. If the trial court admits the other acts evidence based simply on a conclusory recitation of the litany of possible exceptions under Rule 404, the *Spoto* test, and any limiting instruction are rendered worthless. The resultant harm cannot be cured by an appellate court's after-the-

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[1] The 4-prong test for the admission of other acts evidence was fashioned by the Colorado Supreme Court in *People v. Spoto*, 795 P.2d 1314 (1990).

fact application of the *Spoto* test, because, to have meaning, a limiting instruction obviously must be given to the jury during trial. Defense counsel respectfully submit that the trial court committed reversible error by admitting some or all of the other acts evidence contrary to the *Spoto* test.[2] However, even if the appellate court finds applicable one of the exceptions in the litany recited by plaintiffs' counsel and the trial court, there would still be reversible error since the *jury* was not properly instructed as to exactly what limited purpose the evidence could properly serve. *See* Judge Briggs' dissent in *People v. McKibben*, 862 P.2d 991 (Colo.App. 1993), cert.den. (1993).[3]

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[2] We note that Section II.C. of the majority opinion recognized that certain expert testimony was inadmissible, in part, because it related to dissimilar acts involving counselees other than the minor plaintiff: "[A] portion of this testimony was irrelevant. For example, there was no evidence that Wolfe asked the minor to compare his genitals to photographs in any book. Hence, the 'appropriateness' of any such conduct was not relevant to any portion of the minor's claim. At best, it related to incidents allegedly occurring during sessions with other counselees." By extension, *at least* that particular other acts evidence should have been excluded.

[3] One of the cases cited by Judge Briggs was *State v. Saltarelli*, 98 Wash.2d 358, 655 P.2d 697, 700 (Wash. 1982). In that case, the Washington court noted that earlier cases "lack any analysis of the issue and do little more than pay lip service to the great potential for prejudice inherent in evidence of prior sexual offenses. They have been criticized as using motive and intent as 'magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.' " *See*, also Slough & Knightly, "Other vices, Other Crimes," 41 *Iowa Rev.*, 325, 334 (1956) ("When deciding the issue of guilt or innocence in sex cases, where prejudice has

3. Whether, Aside From the Issue of Duplicative Damages, the Damages Awarded to the Plaintiffs Were Excessive.

The majority opinion held that, because the jury was permitted to award damages on separate verdict forms for the same injury, there was duplication of damages. Defense counsel contend that the damages award was excessive, regardless of whether the verdict forms resulted in duplication of damages. Defense counsel agree that the verdict forms were improper, and that duplicative damages were awarded. Compensatory damages totalling $292,472.52 were not supported by the evidence. That may held to explain the excessive amount of damages, but the fact is that the damages were excessive, whether because of duplication or otherwise.

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reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception, offering scant attention to the inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.").

CONCLUSION

Therefore, defendant-appellant Wolfe respectfully requests a rehearing on these issues as to which the Court of Appeals ruled adversely or made no ruling.

Respectfully submitted,

HIBSCHWEILER & JOHNSON

By /s/ James D. Johnson
James D. Johnson, Reg. 9035
Sheila E. Barthel, Reg. 21310
Attorneys for defendant-
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing have been served on counsel of record this 1st day of December, 1994, by placing same in the United States mail, postage prepaid, addressed as follows:

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Quigley & Bruce
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950 South Cherry Street
Denver, Colorado 80222

/s/ Illegible

APPENDIX S

SUPREME COURT, STATE OF COLORADO

Case No. _____

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONER HOMER WOLFE

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE AND J.D.B.,

Respondents.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern, III, District Judge

COLORADO COURT OF APPEALS, Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

APPELLATE OPINION BY JUDGE CRISWELL
JUDGE TAUBMAN SPECIALLY CONCURS,
JUDGE DAVIDSON DISSENTS

COMES NOW petitioner Homer Wolfe, by and through his attorneys, Hibschweiler & Johnson, and submits the following Petition for Writ of Certiorari, pursuant to Rule 51 of the Colorado Appellate Rules:

I. ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

1. Whether the fiduciary duty and outrageous conduct claims are categorically barred by the First Amendment to the United States Constitution; and

2. Whether the trial court committed reversible error in admitting other acts evidence.

II. DECISION AS TO WHICH REVIEW IS SOUGHT

By opinion dated November 17, 1994, the Court of Appeals reversed the judgments entered in favor of the plaintiffs in th[e] trial court, and remanded the case to the trial court for a new trial. A copy of that decision is attached hereto, as Appendix A. In general, petitioner Wolfe accepts the Court of Appeals' decision, except for the two points noted in the advisory listing.

Counsel for Homer Wolfe filed a Petition for Rehearing on limited issues. That Petition was denied on January 5, 1995, with a stay of mandate to and including February 6, 1995. A copy of that Order is attached hereto, marked as Appendix B.

III. GROUNDS UPON WHICH JURISDICTION IS INVOKED

Depending on the interpretation which is given to earlier Colorado appellate cases, petitioner Homer Wolfe submits that the Court of Appeals has either (1) determined a question not previously determined by Colorado Supreme Court, (2) decided a question of substance in a way probably not in accord with applicable decisions of

the Colorado Supreme Court, and/or (3) rendered a decision in conflict with the religion clauses of the First Amendment to the United States Constitution.

IV. STATEMENT OF THE CASE

Petitioner Homer Wolfe was a minister in the Church of Christ, employed at the Bear Valley Church of Christ. As part of his ministry, he provided pastoral counseling, and one of his counselees was plaintiff John DeBose. In the context of pastoral counseling, Mr. Wolfe sometimes used a massage technique with counselees to relax them and to facilitate their connection with God. Although Mr. Wolfe does not recall ever massaging John DeBose, the plaintiffs have alleged that massage occurred, and they have brought claims for breach of fiduciary duty and outrageous conduct against Mr. Wolfe based on that conduct. The trial court allowed those claims to go forward over objection, and entered judgment on jury verdicts for the plaintiffs. Counsel for defendant contend that these subjective claims are categorically barred by the religion clauses of the First Amendment, and that, if they are not categorically barred, such claims would at least be barred by the free exercise clause upon a showing as to the sincerity of the defendant's religious beliefs. The Court of Appeals accepted the narrower second argument, but held that the broader first argument had already been adversely determined by this court in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and *Moses v. Diocese*, 863 P.2d 310 (Colo. 1993), U.S. cert.den. (1994). (See Subsection I.B., at 18 Brief Times Reporter 1939.)

The trial court also allowed presentation of evidence as to other acts involving counselees other than John DeBose, without requiring plaintiffs' counsel to meet the requirements of *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). The trial court admitted this evidence as to a litany of exceptions (motive, plan, intent, accident, or mistake), without *Spoto* findings as to any exception, and the Court of Appeals has affirmed that result with a cursory after-the-fact rationalization. Defense counsel also contend that this treatment constitutes reversible error under *Spoto*.

V. ARGUMENT

1. Whether the fiduciary duty and outrageous conduct claims are categorically barred by the First Amendment to the United States Constitution.

The Colorado Supreme Court has previously decided two cases involving claims against clergymen and/or religious institutions, *Destefano v. Grabrian* and *Moses v. Diocese, supra*. The case of *DeBose v. Wolfe* differs fundamentally from those earlier cases in at least two respects.

First, *DeBose v. Wolfe* is the first case in which counsel representing the individual clergyman have made the effort to invoke the First Amendment in this court.[1]

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[1] In *Destefano v. Grabrian*, Justice Erickson noted:

"If the alleged conduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue. This, however, is not the case. It has not been asserted that

Secondly, in *DeBose v. Wolfe*, the clergyman's alleged conduct is fundamentally different from the conduct acknowledged by the clergymen in *Destefano* and *Moses*. In those earlier cases, there was no question that Father Grabrian and Father Robinson carried on sexual affairs with the counselees/plaintiffs. They did not assert that their conduct was religiously motivated, so as to fall within the purview of the First Amendment. Therefore, both the *Destefano* and *Moses* courts assumed that the conduct of Father Grabrian and Father Robinson did not present any First Amendment issues. However, in *DeBose v. Wolfe*, there is no evidence that defendant Wolfe had any type of sexual affair with John DeBose, nor even any evidence that he engaged in sexually motivated conduct while providing pastoral counseling to him. Mr. Wolfe has acknowledged that he sometimes employed massage in pastoral counseling, to relax the counselee and to help bring him into contact with God.[2] However, this conduct

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Grabrian's conduct falls within the practices or beliefs of the Catholic church."

763 P.2d at 284. The appeal in *Moses v. Diocese* did not even include an appeal by the clergyman, because claims against the clergyman did not go to trial along with the claims against the Diocese and Bishop Frye. Therefore, *DeBose v. Wolfe* is the first case in which defense counsel have briefed the issue of whether Mr. Wolfe's "status liability," based on his status as a clergyman, is subject to First Amendment limitations.

[2] Although Mr. Wolfe does not recall that he ever employed this technique with John DeBose, the plaintiffs have alleged that massage did occur. Plaintiffs' counsel has characterized this alleged massage as "fondling" to imply that it was sexually motivated, but the testimony of John DeBose himself does not support this characterization. The full extent of John DeBose's testimony was that Mr. Wolfe massaged his shoulders and

was motivated by Mr. Wolfe's religious beliefs and his sincere effort to facilitate the counselee's spiritual connection.

In a case such as this one, where the defendant clergyman asserts conduct motivated by religious beliefs, the Court of Appeals recognized that the clergyman is afforded limited First Amendment protection, holding that the jury should have received an instruction that, if the clergyman's religious beliefs were "sincerely held," he could not be held liable. As far as that holding of the Court of Appeals goes, we believe that is a correct application of the law to the circumstances of this case. However, we submit that even broader First Amendment issues are presented, because the causes of action for breach of fiduciary duty and outrageous conduct, which were held to pass constitutional muster in *Destefano v. Grabrian* and *Moses v. Diocese*, actually do not satisfy the First Amendment.

Fiduciary law, and the duties owed by an authentic fiduciary to his beneficiary, originated in situations where the defendant exercised control over the plaintiff's financial affairs, because of which the defendant was charged with an enhanced degree of responsibility based on that

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thighs in the course of pastoral counseling and that, on one occasion, when Mr. DeBose was wearing shorts, while Mr. Wolfe was massaging John DeBose's thigh, there was inadvertent contact between Mr. Wolfe's hand and John DeBose's genitals. The record was analyzed in detail in appellant Wolfe's Reply Brief in the Court of Appeals, to dispel any notion that somewhere in the record there might actually be evidence of "fondling." Space does not permit a reiteration of that analysis here. However, see pages 11-18 in the Reply Brief.

undertaking. See N. Schaumann, *The Lender and the Unconventional Fiduciary*, 23 Seton Hall L. Rev. 21 (1992). Until *Destefano v. Grabrian* was decided, all the Colorado cases involving breach of fiduciary duty concerned some situation in which the defendant allegedly failed to exercise appropriate care when he managed the plaintiff's financial affairs.[3] Except for *Destefano v. Grabrian* and *Moses v. Diocese*, all the later Colorado appellate decisions relating to breach of fiduciary duty likewise involve that element of control of the plaintiff's financial affairs.[4]

As applied to claims against clergymen and religious institutions, however, a claim for breach of fiduciary duty

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[3] In *Destefano*, the "repose of trust" concept was lifted from the definition of the term "fiduciary relationship" set forth in Instruction 31:16, C.J.I. Civil 2d. That instruction was housed in the "Wills" chapter, and the heightened standard of care ("a duty to deal with those interests with utmost good faith and solely for the benefit of the other") was clearly tied to the "fiduciary's" status as a guardian, trustee, executor, agent, etc., such that he had control over the beneficiary's financial affairs. That qualifier was lost when a fragment of the definition was lifted out of context and given effect in isolation. All the cases cited in The Source and Authority to Instruction 31:16 pertained to a fiduciary with control over the financial affairs of the beneficiary.

[4] The Supreme Court's Committee on Civil Jury Instructions has taken this court at its word that the claim for breach of fiduciary duty has been released from its financial moorings, creating an entirely new chapter (Chapter 26, C.J.I. Civil 3d) which defines a freestanding cause of action for breach of fiduciary duty anytime there is a repose of trust by one person in another. However, with the exception of the *Destefano* and *Moses* decisions, all of the cases now annotated in the Source and Authority of Instruction 26:2 involve a "fiduciary" who exercised some control over the plaintiff's *financial* affairs.

takes on an entirely new and unprecedented aspect. The "fiduciary relationship" no longer necessarily involves an exercise of control over the plaintiff's financial affairs, but rather, it may arise solely upon the plaintiff's repose of trust in the defendant, when the defendant accepts that repose of trust. The subject of the fiduciary duty is no longer financial matters, where the heightened standard of care has logical application, but rather, every matter over which the "fiduciary" conceivably may exercise any control or influence. The question of whether there existed a fiduciary relationship between a clergymen or religious organization and a congregant is a factual issue for the jury to decide, along with the issue of the dimensions of the fiduciary duties associated with that fiduciary relationship, and the question of whether there was a breach of the fiduciary duties. By its nature, this cause of action violates the establishment clause of the First Amendment, because the jury would be called upon to invent and impose a standard of care regulating religious activity.[5]

The test for determining whether state action violates the establishment clause appears in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 745 (1971). In the third prong of the *Lemon* test, the U.S. Supreme Court

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[5] "Second, in analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D.N.Y. 1991) (Summary judgment upheld in favor of defendant on plaintiff's breach of fiduciary duty claim.) See also *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (Neb. 1993).

forbade state action which would "foster excessive entanglement with religion." Allowing a breach of fiduciary duty claim to go forward against a clergyman, based on his *status* as a clergyman, produces excessive entanglement, because secular civil authority (the judge and jury in the first instance, and ultimately, the appellate courts) is regulating religious conduct by applying highly subjective standards for breach of fiduciary duty.

Even in cases involving conduct which society may unequivocally condemn (such as the actions of Father Grabrian and Father Robinson in *Destefano* and *Moses*), a claim for breach of fiduciary duty cannot pass constitutional muster, because by its nature the claim gives rise to excessive government entanglement with religion. See *Barquin v. Roman Catholic Diocese*, 839 F.Supp. 275 (D.Vt. 1993). The imposition of criminal liability, which by its nature would involve the application of *objective* criteria not dependent on the clergyman's status as a minister, may avoid the excessive entanglement barred by *Lemon*, and a civil claim for assault and battery might also pass constitutional muster. *Schmidt v. Bishop*, *supra*, 779 F.Supp. at 328. However, breach of fiduciary duty does not.

Likewise, a claim for outrageous conduct gives the jury almost total discretion, and the circumstance which is identified as rendering the conduct "outrageous" is precisely the defendant's status as a clergyman. Secular civil authority is placed in the position of exercising judgment as to what clerical and religious conduct is considered "outrageous," based on subjective perceptions of the proper conduct of clergymen and religious institutions. Again, assuming that some form of government

action in this area could occur without excessive entanglement, that could not be a claim for outrageous conduct.

The foregoing legal analysis has focused on the establishment clause of the First Amendment. The other religion clause is the free exercise clause. As Judge Criswell noted in his majority opinion in the Court of Appeals decision in *DeBose v. Wolfe*, the free exercise clause may be applicable only where there is a basis for arguing that the conduct in question was the product of a religious belief, which may create a factual issue of sincerity to be decided by the jury. In cases such as *Destefano* and *Moses*, where the individual clergymen were indisputably engaging in sexual relations, there may be no basis for associating that conduct with any sincerely held religious belief. However, in *DeBose v. Wolfe*, the free exercise clause is implicated, because Homer Wolfe has asserted that he engaged in religiously motivated conduct during pastoral counseling.

Free exercise analysis depends on the "compelling state interest" test, which permits government action only when it has a compelling interest in regulating the activity, which outweighs the individual's interest, and then only government action by the least intrusive means.[6] In

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[6] *Church of the Lukumi Babaluaye, Inc. v. City of Hialeah*, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). There was concern that *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), might signal an abandonment of the compelling state interest test, and that concern prompted Congress to pass the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, which legislatively mandated the

DeBose v. Wolfe, a compelling state interest has not been demonstrated. However, even assuming for the sake of argument that a compelling state interest may exist, *and* that the balancing component supports some government action, it is apparent that subjective liability for breach of fiduciary duty and outrageous conduct cannot qualify as the least restrictive means of regulating conduct in pastoral counseling.[7] The plaintiffs and their attorneys are critical of Mr. Wolfe's pastoral counseling methods, but their subjective claims based on his religious conduct amount to nothing more than "clergy malpractice" (which was barred in *Destefano v. Grabrian*) because they are based on his *status* as a minister and they require inquisition into the appropriateness of Mr. Wolfe's counseling methods.[8] *Schmidt v. Bishop* is instructive on this point:

"compelling state interest" test in free exercise cases. In any event, later cases affirmed the compelling state interest test even before the statute was adopted. See, e.g., *Lukumi Babaluaye, supra*.

[7] The least restrictive means of regulating "unacceptable" conduct of this type would be to allow a criminal charge or a tort claim based on a neutral law of general applicability, such as assault or battery, to go forward. See *Schmidt v. Bishop*, 779 F.Supp. at 328.

[8] In *Destefano*, the court held that a claim for "clergy malpractice" is not actionable in Colorado (Section III.C. of the opinion), although a claim for breach of fiduciary duty could go forward (Section III.B.). Section III.C. recognized that the foreclosed "clergy malpractice" theory would include "unreasonable lack of skill or fidelity in professional or fiduciary duties," whereas Section III.B. allowed a claim based on a "fiduciary duty." Our best effort to reconcile these parts of the opinion has been to read Section III.C. as foreclosing any claim which depends on a subjective analysis, while reading Section III.B. as allowing only fiduciary duty claims which

> "Plaintiff has deliberately avoided asserting that the case involves clergy malpractice, but rather styles this claim artfully as one for malpractice by a 'youth worker and counselor'. . . . It is a fact conceded in the complaint that plaintiff's parents brought her to defendant Bishop because he was their clergyman. That the complaint is founded on this relationship is confirmed by the pleading of a respondeat superior claim against the Rye Presbyterian Church, of which Rev. Bishop was then pastor."

779 F.Supp. at 326-327.

2. Whether the trial court committed reversible error in admitting other acts evidence.

The Court of Appeals sustained the trial court's reception of other acts evidence based on a cursory treatment of the elements of the *Spoto* test (named for *People v.*

---

would involve some objective standard of conduct. To some extent, Judge Criswell has adopted that approach, holding that expert testimony as to a standard of care or a breach of that standard is impermissible. However, we respectfully submit that the Court of Appeals' holding did not go far enough. Under the facts of this case, as set forth in the record, there is no allegation of overt sexual activity by Homer Wolfe of the type which might be condemned under an objective fiduciary standard. The plaintiffs' case amounts to Mr. Wolfe's alleged use of massage as a counseling technique, their criticism of this religiously motivated conduct, and their subjective claims based on that conduct. Such claims are categorically barred by Section III.C. of *Destefano v. Grabrian*, precisely because of this court's unwillingness to wade into a quagmire to try to determine what, if any, "clergy malpractice" claims might withstand applying First Amendment analysis to this case.

Spoto, supra). With all due respect to the Court of Appeals, we respectfully submit that it has improperly applied the *Spoto* test, so as to allow evidence of events which had no meaningful similarity to any of the events alleged by plaintiff John DeBose. This is analyzed at length in Section C of appellant Wolfe's Amended Opening Brief in the Court of Appeals, and space does not permit us to reiterate that analysis here. Perhaps more importantly, the proponent of the evidence in the trial court (plaintiffs' counsel) failed to address the *Spoto* test in any meaningful fashion, and the trial court failed to give any meaningful treatment to the *Spoto* test. Both counsel and the court resorted to a litany of possible exceptions (motive, plan, intent, accident, or mistake) without any pretense of the point-by-point *Spoto* analysis for any one exception. Vol. 10 38:12-15, Vol. 10, 4:24-6:1. The *Spoto* test clearly contemplates that the proponent of the evidence must make a specific showing as to every element, and that the trial court must make a clear finding as to every element. Allowing this omission to be remedied on appeal, by a cursory after-the-fact analysis, does violence to the very concept of the *Spoto* case.

CONCLUSION

For the reasons set forth above, petitioner Homer Wolfe respectfully requests that this court grant his Petition for a Writ of Certiorari in this case.

Respectfully submitted

HIBSCHWEILER & JOHNSON

By _____

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ATTORNEYS FOR PETITIONER
HOMER WOLFE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari on Behalf of Petitioner Homer Wolfe has been served on counsel of record this 6th day of February, 1995, by placing same in the United States mail, postage prepaid, addressed as follows:

Ms. Joyce Seelen
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One Norwest Center, Suite 2530
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APPENDIX T

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC42
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 92CA1929
DISTRICT COURT, CITY AND
COUNTY OF DENVER, 91CV4346

ORDER OF COURT

BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE, and J.D.B. a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

Upon consideration of the Motion for Reconsideration and the Responses thereto, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the issues previously granted are revised and two additional issues are GRANTED. The briefs shall be filed as follows:

(a) Petitioner/Cross-Respondent's Opening Brief shall be filed within forty days from this date;

(b) Respondent(s)/Cross-Petitioner(s)' Combined Answer/Opening Brief(s) shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner/Cross-Respondent's Combined Answer/Reply Brief shall be filed within thirty days from receipt of the Combined Answer/ Opening Brief(s); and

(d) Respondent(s)/Cross-Petitioner(s)' Reply Brief(s) may be filed within fourteen days from receipt of the Combined Answer/Reply Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The issues announced by the Court this day are as follows:

1. Whether the First Amendment provides a defense to tort claims if the alleged tortious conduct is motivated by a sincerely held religious belief.

2. Whether the court of appeals erred in holding that expert testimony regarding conduct appropriate in counseling a minor was admitted in error.

3. Whether the court of appeals departed from accepted precedent in reversing verdicts where the defendants did not object to the instructions or verdict forms at trial or on appeal.

4. Whether the court of appeals erred in reversing the jury verdicts based on their form.

BY THE COURT, EN BANC, JULY 19, 1995.

cc:

(SEAL)

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Patrick H. Stanford, Clerk
Colorado Court of Appeals

Supreme Court
State of Colorado
Certified to be a full,
true and correct copy

JUL 19 1995

MAC V. DANFORD
Clerk of the
Supreme Court
By /s/ Illegible
Deputy
Clerk

Court Seal

APPENDIX U

SUPREME COURT, STATE OF COLORADO

Case No. 95-SC-42

COMBINED OPENING/ANSWER BRIEF OF
RESPONDENT/CROSS-PETITIONER
HOMER WOLFE

BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE AND J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

REVIEW ON CERTIORARI FROM THE
COLORADO COURT OF APPEALS

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IV. ARGUMENT

A. THE FREE EXERCISE CLAUSE IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES A DEFENSE TO THE TORT CLAIMS STATED AGAINST DEFENDANT HOMER WOLFE IN THIS CASE IF THE ALLEGED TORTIOUS CONDUCT IS MOTIVATED BY A SINCERELY HELD RELIGIOUS BELIEF.

The religion clauses of the First Amendment to the United States Constitution have been held applicable to the states under the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939). In *Destefano v. Grabrian*, this court acknowledged that spiritual counseling may implicate these First Amendment rights and that, if Father Grabrian had been motivated by sincerely held religious beliefs, "we would have to resolve a difficult first amendment issue." 763 P.2d at 283, 284. Homer Wolfe maintains that his conduct in pastoral counseling of John DeBose was an expression of sincerely held religious beliefs, and so this constitutional issue must now be faced.

To answer the First Amendment question framed by the court, it is necessary to determine the governing standard and then to apply that standard. However, the wording of the constitutional issue announced by the court is very broad in some respects and narrow in others, and may be subject to misinterpretation. To place this issue in perspective, the explicit or implicit limitations on the scope of the issue will first be noted after which the issues as so limited will be addressed.

1. LIMITATIONS ON THE SCOPE OF THE CONSTITUTIONAL ISSUE FRAMED BY THE COURT.

a. The Constitutional Issue Is Limited to the Free Exercise Clause of the First Amendment.

Although the issue as framed refers to "the First Amendment," that Amendment contains two "religion" clauses, the Free Exercise Clause and the Establishment Clause. The requirement of a sincerely held religious belief is only pertinent to the analysis of the Free Exercise Clause. The grant of certiorari refers to a sincerely held religious belief, so this issue is understood actually to relate only to the Free Exercise Clause.

b. The Constitutional Issue Is Understood to Build on the Foundation of the Colorado Supreme Court's Earlier Rulings That a Claim for "Clergy Malpractice" Is Not Recognized Because of the Constitutional Problems Associated with Such a Claim.

Defense counsel understand this court to be building on the framework of *Destefano* and *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert.den. ___U.S.___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994), in which this Court already declined to recognize "clergy malpractice," because of constitutional problems surrounding such a cause of action. Therefore, the grant of certiorari is further understood to focus on *other* tort liability.

c. The Constitutional Issue Accepts as a Given, for Purposes of Analysis, that Defendant Wolfe's Conduct Was Religiously Motivated

The grant of certiorari treats it as a *given* for purposes of the constitutional analysis that the defendant *has* a sincerely held religious belief, which motivated his conduct. Therefore, the court is not reviewing the rulings that the evidence was sufficient to raise the issue of religious motivation, or that sincerity is a jury question. The grant of certiorari is limited to the question of whether the Free Exercise Clause *ever* provides a tort defense, even given the motivation of a sincerely held religious belief.

d. By Definition, This Issue Excludes from the Analysis Any Form of Conduct Which Is Not Religiously Motivated

Since this issue presupposes that the defendant's conduct was motivated by a sincerely held religious belief, it by definition excludes the class of tort claims against clergymen in which the defendant's actions are not *claimed* to be motivated by religious beliefs. That class of tort cases not subject to Free Exercise analysis would include (1) ordinary negligence cases (e.g., negligence by a clergyman in the operation of a motor vehicle, or a negligence claim against a church based on a slip-and-fall on its premises), for which no motivation by a sincerely held religious belief is claimed; (2) cases involving intentional torts where no sincerely held religious belief is

involved (e.g., assault or battery coincidentally committed by a clergyman); and (3) cases involving certain other theories (e.g., "breach of fiduciary duty" or "outrageous conduct" by a clergyman who engages in sexual relations with a member of his congregation), where the defendant claims no religious motivation for his actions.

e. The Constitutional Issue Necessarily Focuses on the Conduct Alleged in This Case and the Claims Stated in this Case.

It is further necessary to note that the types of conduct stipulated to arguably be motivated by a sincerely held religious belief, and the types of claims arising out of such conduct, may vary. "Tort claims" are not fungible for purposes of Free Exercise analysis, and a categorical "yes" or "no" answer to the question framed by the court is not possible.

Under Article VI, Section 3, of the Colorado Constitution, appellate courts are prohibited from rendering advisory opinions on hypothetical fact situations or otherwise deciding abstract legal questions. *People ex rel. Danielson v. Amity Mut. Irr.*, 668 P.2d 1368 (Colo. 1983); *Kemp v. Empire Sav., Bldg. and Loan Ass'n*, 660 P.2d 899 (Colo. 1983); *People v. Campbell*, 196 Colo. 390, 589 P.2d 1360 (Colo. 1978); *Cameron v. Carroll & Co.*, 148 Colo. 432, 334 P.2d 748 (1959); and *State ex rel. State Board of Agriculture v. Leddy*, 60 Colo. 498, 154 P. 94 (1916). This is comparable to the "case or controversy" requirement under Article III

in the United States Constitution.[1] If the court tried to provide a categorical answer, without regard for the specific conduct involved in this case or the specific claims stated against the defendants, that broad opinion would be dicta, and not controlling on later decisions. *Young v. People*, 54 Colo. 293, 130 P. 1011 (1913); *Coon v. Berger*, 41 Colo.App. 358, 588 P.2d 386 (1978), aff'd on other grounds, 199 Colo. 133, 606 P.2d 68 (1980). Therefore, it is incumbent on the court to decide only the availability of a Free Exercise defense to claims of the type actually stated, with reference to the specific facts of this case.

2. THE APPLICABLE STANDARD FOR REVIEW UNDER THE FREE EXERCISE CLAUSE

This analysis of the applicable standard starts with the Compelling State Interest Test, and counsel for defendant Wolfe submit that it comes out at that test.

a. The Compelling State Interest Test

In general, cases under the Free Exercise Clause have been governed by the Compelling State Interest Test, which is traceable to *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). This is a 3-stage analysis: (1) whether the conduct in question is

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[1] See *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); *United States v. Fruehauf*, 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731 (1923); and *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

motivated by a sincerely held religious belief; (2) whether the state action infringes on the free exercise of religion; and (3) whether there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. 92 S.Ct. at 1532. The third stage of this analysis requires a balancing of interests: whether the state's interest is so compelling that the individual's free exercise interest must give way. If an overriding state interest is demonstrated, the state must use the least intrusive means to protect that interest. *Cantwell v. Connecticut, supra; McDaniel v. Paty,* 435 U.S 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* ___U.S.___, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

b. The Neutral Law of General Applicability Exception: *Employment Division v. Smith*

In *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), Justice Scalia, writing for a plurality, stated that a neutral law of general applicability may be given effect, even though it has the incidental effect of burdening an individual's free exercise of religion, without triggering the Compelling State Interest analysis. There the petitioner was denied unemployment compensation benefits after he was fired from his job for using peyote in Native American religious rituals. Under Oregon and federal law, peyote is a controlled substance, the use or possession of which is a criminal offense, but Smith argued that his use was constitutionally protected.

Writing for a plurality, Justice Scalia conducted an analysis focusing on the fact that the criminal statutes prohibiting use or possession of peyote were neutral laws of general applicability, which were applicable across the board, and did not depend on the religious context in which the defendant happened to be using peyote. Since this was a neutral law of general applicability, the state's action, in denying unemployment compensation benefits to Smith because he was fired for illegal conduct, was upheld.

c. "As Applied": *Church of Lukumi Babalu Aye v. City of Hialeah*

In the later case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* [sometimes hereafter referred to as *"Lukumi Babalu Aye"*], the U.S. Supreme Court acknowledged the holding of *Employment Division v. Smith*, but nevertheless returned to the Compelling State Interest Test, because the ordinances there in question were *not* "neutral laws of general applicability" *as applied*. Justice Kennedy noted that:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), and 'covert suppression of particular religious beliefs,' *Bowen v. Roy, supra*, at 703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

> The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[2]

113 S.Ct. at 2227.

d. The Religious Freedom Restoration Act

In the wake of *Employment Division v. Smith*, commentators expressed great consternation about the prospect that the *Smith* case might have effectively abolished the Compelling State Interest Test, and gelded the Free Exercise Clause.[3] In response to the concerns expressed about *Employment Division v. Smith*, Congress adopted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, sometimes referred to as the "RFRA." That statute legislatively mandates that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"

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[2] *Wisconsin v. Yoder, supra*, had earlier said that "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 92 S.Ct. at 1536. However, there seems to have been speculation that *Employment Division v. Smith* applied anytime a law was *facially* neutral. *Lukumi Babalu Aye* indicates the contrary.

[3] See, Case Note, *Employment Division v. Smith: A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 B.Y.U.L. Rev. 1331 (1991) and Case Note, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 Baylor L. Rev. 577 (Winter 1991). See, also, *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1102-1103 (7th Cir. 1990); *United States v. Philadelphia Yearly Meeting of the Religious Soc. of Friends*, 753 F.Supp. 1300 (E.D. Pa. 1990); and *Minnesota v. Herschberger*, 462 N.W.2d 393 (Minn. 1990).

except "where it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Thus, this statute in essence mandates the use of the "Compelling State Interest" Test in all cases involving the Free Exercise Clause.

The validity and implications of the Religious Freedom Restoration Act are still being determined by the courts.[4] However, counsel for respondent Wolfe respectfully submit that the Compelling State Interest Test is controlling in this case either under applicable decisions of the United States Supreme Court (especially *Lukumi Babalu Aye*) *or* under the Religious Freedom Restoration Act. The "breach of fiduciary duty" and "outrageous conduct" claims allowed to go forward against defendant Wolfe do not meet the test of "neutral laws of general applicability," precisely because their application to Mr. Wolfe was premised on his status as a clergyman. Therefore, whether or not the RFRA is deemed controlling, the result is the same. (This is discussed in Argument A.3., below.)

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[4] See, e.g., *Belgard v. State of Hawaii*, 883 F.Supp. 510 (D. Hawaii 1995) (constitutionality of RFRA upheld); *Flores v. City of Boerhe*, 877 F. Supp. 355 (W.D. Tex. 1995) (RFRA held unconstitutional); and *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994) (constitutionality of RFRA questioned). See, also, Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Hen House Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357 (Dec.1994).

3. AS APPLIED TO IMPOSE LIABILITY ON DEFENDANT WOLFE IN THIS CASE, THE CIVIL CLAIMS FOR BREACH OF FIDUCIARY DUTY AND "OUTRAGEOUS CONDUCT" ARE NOT NEUTRAL LAWS OF GENERAL APPLICABILITY

The civil causes of action for breach of fiduciary duty and "outrageous conduct," as applied to impose liability on Homer Wolfe in this case, are not "neutral laws of general applicability." Neutrality and general applicability are distinct and separate requirements. In *Lukumi Babalu Aye*, Justice Kennedy noted that these concepts are interrelated, and that a law which fails to satisfy one requirements will, in all likelihood, fail to satisfy the other [113 S.Ct. at 2226], but failure to satisfy *either* requirement triggers Compelling State Interest analysis.

Neutrality is the first element. As noted above in Section A.2.c., a law that is neutral on its face may not be neutral *as applied*. "Improper targeting" of religious activity is an indication of non-neutrality, and the expressions of purpose associated with the enactment of a law may demonstrate improper targeting.[5] Here, the problem of applying these constitutional principles is complicated because we are dealing with common law causes of action rather than statutes. Nevertheless, the decisions handed down by the Colorado Supreme Court in *Destefano* and *Moses* themselves demonstrate this constitutionally impermissible targeting.

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[5] Note that, in evaluating whether the real object of the ordinances was to target conduct *because* it was religiously motivated, Justice Kennedy took guidance from equal protection cases. 113 S.Ct. at 2230-2231.

In *Destefano*, the court implicitly recognized that a cause of action for "clergy malpractice" would not be even *facially* neutral. Therefore, the Court declined to recognize that cause of action. However, as a surrogate for "clergy malpractice," the court reinvented the established claim for "breach of fiduciary duty," lifting it out of its traditional context, where it served to impose liability on defendants who misused their control over a plaintiff's *financial* affairs. The concept of fiduciary duties evolved to deal with situations where one person exercises control over the *financial* affairs of another. Fiduciary law developed to provide a "moral dimension to the body of law that regulates economic activity." N. Schaumann, *The Lender and Unconventional Fiduciary*, 23 Seton Hall L. Rev. 21 (1992). The limited scope of *true* fiduciary duties is demonstrated by the Uniform Fiduciaries Law, enacted in Colorado as C.R.S. §§ 15-1-101 et seq., and related statutory provisions such as the Colorado Fiduciaries' Powers Act, C.R.S. §§ 15-1-801 et seq. (See esp. definitions of "fiduciary" in §§ 15-1-103(2) and 15-1-802(3).) Even as to a true fiduciary, not all duties owed are "fiduciary" duties:

> "Finally, fiduciary duties do not include a duty of care. Fiduciaries often owe a duty of care to their beneficiaries, which in some, but not all, cases is more demanding than that owed the general public, **but not every duty owed by a fiduciary to a beneficiary is a 'fiduciary duty.'** It serves no useful purpose so to expand the idea of fiduciary duty. Although fiduciary status at times may be relevant to assessing the duty of care owed a beneficiary, the duty of care is defined and governed not by fiduciary law but by tort (and sometimes contract) law. Clarity

> of analysis is enhanced by maintaining this distinction. Tort law is no more 'fiduciary' than is tax law, although most fiduciaries are subject to both."

23 Seton Hall L. Rev. at pp. 30-31 (emphasis added). Disregarding these considerations, *Destefano* expanded breach of fiduciary duty for the purpose of imposing liability on Father Grabrian based on his status as a clergyman.

The categorization of the pastoral counselor in *Destefano* as a "fiduciary" was based on a fragment of C.J.I. Civil 2d Instruction 31:16, which was housed in the chapter dealing with *wills*. A copy is attached as Appendix A. This instruction focused initially on the requirement that the putative "fiduciary" act in some capacity where he has power to exercise financial control which affects the other party, and then defined the duty triggered. The court lifted the *duty* owed by a fiduciary out of this instruction, without regard for the status required to trigger that duty. As it existed when *Destefano* was decided, the Source and Authority for Instruction 31:16 cited several Colorado cases illustrating the types of relationships which may exhibit a fiduciary component in Colorado. Where fiduciary duty was found to exist, those cases invariably involved a "financial control" aspect which triggered the fiduciary duty.

Aside from *Destefano v. Grabrian* and *Moses v. Diocese*, all the *later* fiduciary duty cases finding a fiduciary duty have likewise involved *financial* control. See, e.g., *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (1988), cert.den. (1989); and *Zick v. Krob*, 872 P.2d 1290 (Colo.App. 1993). The Supreme Court's Committee on

Civil Jury Instructions has created an entirely new chapter (Chapter 26, C.J.I. Civil 3d) to deal with the transformed, freestanding cause of action for breach of fiduciary duty understood to have been recognized in *Destefano* and reaffirmed in *Moses*. However, with the exception of the *Destefano* and *Moses* decisions, all of the cases now annotated in the Source and Authority of C.J.I. Civil 3d Instruction 26:2 involve a "fiduciary" who exercised some control over the plaintiff's *financial* affairs. (A copy of this instruction is attached as Appendix B.)

Thus, it is apparent that the traditionally narrow concept of breach of fiduciary duty was transformed in *Destefano* for the precise purpose of imposing liability on Father Grabrian based on his status as a Catholic priest who provided pastoral counseling, and the transformed cause of action is now being used to get other clergymen based on their status as such.

In *Moses v. Diocese*, defense counsel raised the argument that the manifestation of "breach of fiduciary duty" recognized in *Destefano v. Grabrian* was simply another way of denominating a claim for clergy malpractice. The Colorado Supreme Court rejected that argument, on the basis that the clergyman's liability for breach of fiduciary duty was unrelated to his "professional" status as a clergyman, which the court said would justify treating that claim differently from a claim for "clergy malpractice":

> "The fundamental difference between the two causes of action is the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional

> standard of care. In *Destefano*, we held the defendant owed a fiduciary duty to the plaintiff that 'was created by his **undertaking to counsel** [the plaintiff].' *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). The **position of trust** occupied by the defendant, when coupled with his **positive act of counseling** the plaintiff, resulted in a duty to the plaintiff. The relevant common facts in *Destefano* and Tenantry's case are not the profession of the defendants; the relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty. In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not. Id. at 384-86."

863 P.2d at 321, footnote 13 (emphasis supplied). However, just as Father Grabrian's "position of trust" *was* his position as a Catholic priest, and the counseling he undertook was *pastoral counseling*, Bishop Frey's "position of trust" in the *Moses* case was his "superior position **as a counselor, a bishop, and a final arbiter of problems with the clergy.**" 863 P.2d at 322 (emphasis added). The court referred to Bishop Frey's "position of authority in the church," which gave him "the power to resolve conflicts in the church." Id. The court also referred to the plaintiff's belief that Bishop Frey "had the power to decide if she would lose her salvation." Id. The court also stated that, although the "clergy-parishioner" relationship is not necessarily a "fiduciary" relationship, it does "involve the type of interaction that creates trust and reliance," and ended with the statement that "Courts *have* recognized the fiduciary nature of the clergy-parishioner relationship." Id.

Therefore, even though the black and white statement of the expanded cause of action for "breach of fiduciary duty" may suggest facial neutrality, when this tort cause of action is applied to clergymen it is not neutral. When a clergyman is sued for breach of fiduciary duty, it is his *status* as a clergyman which allegedly gives rise to the existence of a fiduciary duty, and plaintiffs' counsel generally make the effort (as they did in this case) to establish the existence of a pastoral counseling relationship, since that is the one context in which the Colorado Supreme Court has found this new species of fiduciary duty. A civil claim for breach of fiduciary duty which grows out of that religious status cannot possibly constitute a neutral law of general applicability. As applied to the individual defendant, the fiduciary duty is premised on his status as a clergyman, and more particularly on his status as a clergyman providing pastoral counseling. The fact that a stockbroker may be subject to breach of fiduciary duty for churning his client's stock investments, or that a lawyer may be subject to breach of fiduciary duty for dissipating funds which he holds in trust for a client, does not make this new form of fiduciary law a "neutral law of general applicability" when it is used to impose liability on a clergyman based on his status **as a clergyman**.

A state supreme court plays two roles. Acting as the ultimate arbiter of the boundaries and characteristics of the Colorado common law, the *Destefano* court declined to fashion a cause of action for "clergy malpractice" under the Colorado common law, but then proceeded to rip "breach of fiduciary duty" free from its traditional moorings to fill the "clergy malpractice" void. The Colorado

Supreme Court certainly has the power to redefine the common law in this state. However, the Colorado Supreme Court also plays a second role, applying the U.S. Constitution, and it is subordinate to the **United States** Supreme Court in that regard. The redefined concepts of "fiduciary relationship" and "fiduciary duty" would have to pass **constitutional** muster under the religion clauses of the First Amendment, when the redefined cause of action is applied to impose liability on clergymen and religious institutions based on their status as such. Defense counsel respectfully submit that the semantic distinction between clergy malpractice and breach of fiduciary duty has no constitutional dimension. As stated in *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D.N.Y. 1991), the fiduciary duty claim raises "the **same** constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." See, also, *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994), aff'g in part and rev'g in part *Dausch v. Rykse*, 1993 WL 34873 (N.D.Ill. 1993). The same is true if "outrageous conduct" is used to fill the void.

Furthermore, it is critical to note that this cause of action for breach of fiduciary duty is not *applied* in the same manner to other types of defendants as to clergymen. In *Crystal Homes v. Radetsky*, 895 P.2d 1179, 1182 (Colo.App. 1995), the plaintiff tried to sidestep the requirement that a client suing a lawyer for professional malpractice must present expert testimony establishing a standard of care and the lawyer's breach thereof, by suing for breach of fiduciary duty, based on the alleged existence of a "confidential relationship between the parties independent of any lawyer-client relationship."

Although the Court of Appeals acknowledged the *Moses* decision, it went on to say that "the foundation for any confidential or fiduciary relationship asserted here was necessarily based upon the alleged attorney-client status between the parties," since there was "no other basis alleged for plaintiff's asserted justifiable reposition of special trust or confidence in defendant." Thus the court ruled that any duties owed by the defendant attorney "would be measured against standards applicable to attorneys." Thus, when the plaintiff is making a claim against his attorney, based on his status as an attorney, the plaintiff is relegated to a legal malpractice claim. He cannot transform this into a "breach of fiduciary duty claim," even though his evidence shows the requisite "justifiable reposition of special trust or confidence" in the defendant. When the defendant is a clergyman, however, the plaintiff is allowed to invoke the transformed cause of action for "breach of fiduciary duty," precisely because no "clergy malpractice" claim is available against the defendant. This demonstrates that the transformed "breach of fiduciary duty claim" has been appropriated to accomplish indirectly what the court recognized it could not accomplish directly. As Justice Kennedy recognized in *Lukumi Babalu Aye*, "the effect of a law in its real operation is strong evidence of its object." 113 S.Ct. at 2228.

Lukumi Babalu Aye also held that one ordinance was not neutral because it represented "a system of 'individualized governmental assessment of the reasons for the relevant conduct.' " 113 S.Ct. at 2229. Similarly, the essence of these common law claims is to establish a

system of individualized governmental assessment of the reasons for the defendant's conduct.[6]

The cause of action for "breach of fiduciary duty," as applied to impose liability on clergymen and religious institutions, also fails as a law of "general applicability." In *Employment Division v. Smith*, the statute prohibiting the use or possession of peyote was considered to be a law of general applicability precisely because it applied to everyone. When the peyote statute was applied to Smith, it was *not* applied to him *because* of his status as an adherent of a Native American religion. The fact that the application of this general law burdened Smith's religious practice was treated as an "incidental effect." In this case, the transformed cause of action for "breach of fiduciary duty," on its face does not apply to everyone, but only to certain persons considered to be in a superior position in

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[6] It is worth noting that *Lukumi Babalu Aye*'s neutrality analysis also borrowed a variant of the "least restrictive means" test (discussed below in Argument A.4.c.), finding "significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribed more religious conduct than is necessary to achieve their stated ends." 113 S.Ct. at 2229. The court later noted that "narrower regulation would achieve the city's interest in preventing cruelty to animals. . . . [R]egulation of condition and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. . . . If the city has a real concern that other methods are less humane, . . . the subject of the regulation should be the method of slaughter itself not a religious classification that is said to bear some general relation to it." 113 S.Ct. at 2230. "[T]he ordinances suppress more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." 113 S.Ct. at 2231. This brings the analysis full circle.

whom trust has been reposed. Furthermore, as applied to impose liability on clergymen, it is precisely their *status* as clergymen which triggers the liability.

In *Lukumi Babalu Aye*, Justice Kennedy concluded that it was not necessary there to "define with precision the standard used to evaluate whether a prohibition is of general application," because the City of Hialeah's ordinances were clearly too underinclusive to qualify. 113 S.Ct. at 2232. The court held that, to the extent the city might have had legitimate interests in protecting the public health and preventing cruelty to animals, the ordinances should have been directed at *conduct* contrary to these interests without regard for who might engage in that conduct. Because they were tailored to "rituals" and "sacrifices," the ordinances were not "generally applicable." In this case, the transformed cause of action for "breach of fiduciary duty," is not generally applicable on its face, and it is certainly selectively applied to clergymen and religious institutions. Conduct-oriented government action (such as a criminal assault statute or the civil tort of battery) may be "generally applicable," but this status-based claim is not.

Thus, the transformed cause of action for "breach of fiduciary duty" recognized and applied in *Destefano v. Grabrian* and *Moses v. Diocese* is neither a neutral law nor a law of general applicability. That requires that its application to Homer Wolfe be strictly scrutinized under the Compelling State Interest Test, given the assumed religious motivation.

The foregoing analysis has focused on the claim for breach of fiduciary duty. Defendant Wolfe is also challenging the "outrageous conduct" claim on constitutional grounds. On its face, the tort of "outrageous conduct" may seem like a better candidate to qualify as a neutral law of general applicability. As defined in C.J.I. Civil 3d Instruction 23:1, liability for outrageous conduct may be imposed anytime the jury finds (1) that the defendant engaged in "extreme and outrageous conduct," (2) that when the defendant engaged in that conduct, he acted recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) that the plaintiff incurred severe emotional distress as a result of the defendant's conduct. Thus, more so than the transformed claim for "breach of fiduciary duty," "outrageous conduct" on its face is not directly targeted toward clergymen or religious institutions. Nevertheless, **as applied** to impose liability on a clergyman, it is precisely the defendant's *status* as a clergyman which is emphasized as the factor which makes his conduct "extreme and outrageous." This places a lay jury in the position of deciding whether a reasonable member of the *secular* community would regard the clergyman's conduct, in his capacity as a clergyman, as "atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community." See C.J.I. Civil 3d Instruction 23:2. Unlike civil liability for negligence in the operation of a motor vehicle, or even civil liability for assault and battery, the tort of "outrageous conduct" clearly does not involve any objective criteria for imposition of liability. In fact, by its very nature, the tort of "outrageous conduct" is a gap-filler tort, which is supposed to be available in situations

where traditional tort theories would not provide for recovery, but the court wants to give the plaintiff a cause of action.[7] Thus, by its very nature, "outrageous conduct" involves looking at the particular circumstances of the case, and applying a subjective standard. This in no way qualifies as a neutral law of general applicability, when it is applied to impose liability because of the secular jury's perceptions of what **a clergyman** should and should not do **as a clergyman**. In essence, this becomes a special claim tailored to impose liability on clergymen, because no general *or* neutral standard is applied.[8] Allowing a civil jury to impose liability on a clergyman, for religiously motivated conduct, based on this highly subjective standard, results in suppression of viscerally unpopular views. This is precisely what the religion clauses were intended to prevent: "Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.' " *Lukumi Babalu Aye*, 113 S.Ct. at 2226 (citations

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[7] See *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky.App. 1993); *Rice v. Janovich*, 742 P.2d 1230 (Wash. 1987); *Criss v. Criss*, 356 S.E.2d 620 (W.Va. 1987); and *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 321 S.E. 2d 602 (1984); and *Bankhead v. City of Tacoma*, 597 P.2d 920 (Wash.App. 1979).

[8] "[A] court cannot remedy religiously motivated intentional infliction of emotional distress without, in effect, taking sides in a religious dispute. The principles of neutrality developed by the Supreme Court are, therefore, of no use here. Only if the conduct in question has been held not to be religious could the court avoid inquiry into religious doctrine while awarding damages against a spiritual counselor for counseling conduct." Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 Mich.L.Rev. 1296, 1312 (May 1986).

omitted). This is not regulation *in spite of* the religious context, but regulation *because of* the religious context.[9]

4. APPLICATION OF THE COMPELLING STATE INTEREST TEST IN THIS CASE

As noted above in Argument A.2.b.1., the Compelling State Interest Test has 3 prongs. Each will be addressed in turn.

a. The First Prong: The Conduct in Question Is Motivated by a Sincerely Held Religious Belief

The first prong of the Free Exercise Clause is whether the conduct in question is motivated by a sincerely held religious belief. In this case, the Court of Appeals held that there was sufficient evidence to satisfy this prong, *if* the jury found that defendant Wolfe was sincere in claiming that his conduct was religiously motivated. Consistent with *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882,

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[9] *Lukumi Babalu Aye* cited *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), for the proposition that "discriminatory purpose" implies that the state has acted " 'because of,' not merely 'in spite of,' " the impact on the affected class. 113 S.Ct. at 2231. Any effort to excuse "outrageous conduct" from constitutional constraints by the expedient of labeling it as a "neutral law of general applicability," in spite of its completely subjective standards, certainly misuses the *Smith* decision. If that evasion is not dismissed out of hand, then the entire premise of *Smith*'s "neutral law of general applicability" exception would have to be reexamined. See Justice Souter's concurrence in *Lukumi Babalu Aye*, at 113 S.Ct. 2240-2250.2

88 L.Ed. 1148 (1944), the Court of Appeals held that neither the court nor the jury could inquire into the validity of the asserted religious belief or practice, but that the question of whether this belief was sincerely held was a question of fact for the jury. The issue framed by this court presupposes that the defendant's conduct was motivated by a sincerely held religious belief, and then asks whether, given that predicate, the First Amendment provides a defense. Therefore, this court is accepting, for purposes of this certiorari review, that the first prong of the Compelling State Interest Test has been satisfied.

b. The Second Prong: The State Action in the Form of These Civil Causes of Action Constitutes a Substantial Burden on the Defendant's Free Exercise of Religion

The second prong of the Compelling State Interest Test involves a determination as to whether the state action infringes on the free exercise of religion. Allowing claims for breach of fiduciary duty and outrageous conduct of the type filed against Wolfe by the DeBoses would necessarily have a chilling effect on Wolfe's free exercise of his religious beliefs. The central purpose of this lawsuit is to subject Mr. Wolfe (and BVCC) to liability based on the pastoral counseling provided to John DeBose. In some abstract sense, it may be possible to argue that civil damages are not primarily intended to perform a behavior-shaping function, but to compensate the plaintiff for his injuries. However, the practical reality is that exposure to liability for compensatory damages obviously has

its own chilling effect on the free exercise of religion.[10] As stated in *Schmidt v. Bishop*, 779 F.Supp. at 332, "Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of a religious denomination. . . . " [Citing *Watson v. Jones*, 80 U.S. 679, 13 Wall. 679, 20 L.Ed. 666 (1871).]

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[10] Through the courts, the state defines what common law civil causes of action will be recognized, and provides the means for plaintiffs to obtain judgments. "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them." *Delli Paoli v. U.S.*, 352 U.S. 231, 77 S.Ct. 294, 300, 1 L.Ed.2d 278 (1957). As stated in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 2082, 114 L.Ed.2d 660 (1991), "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." In that case, the U.S. Supreme Court held that even the exercise of peremptory challenges by private litigants in a civil action is subject to constitutional constraints, because the jury selection procedure constitutes state action. In so holding, the court focused on various factors, including the "direct and indispensable participation of the judge, who beyond all question is a state actor"; the government's creation of "the legal framework governing the [challenged] conduct"; the jury's "exercise [of] the power of the court and of the government that confers the court's jurisdiction"; in a case involving punitive damages, the jury's responsibility to "weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct"; and the fact that the verdict will be reduced to a "judgment enforceable by the court." 111 S.Ct. at 2085. The court stated that "These are traditional functions of government, not of a select, private group beyond the reach of the Constitution." Id.

c. The Third Prong: There Is No State Interest of Sufficient Magnitude to Override the Defendant's Free Exercise Rights in This Case, and Civil Claims for Breach of Fiduciary Duty and "Outrageous Conduct" Are Not the Least Intrusive Means of Protecting That Interest.

The third prong of the Compelling State Interest Test is whether the state has a compelling interest which outweighs the defendant's right to free exercise of religion, and whether the mechanism in question is the least restrictive means of protecting that compelling state interest. It seems worth repeating that the question in this particular case is whether the state has a compelling state interest in regulating the particular conduct of which Homer Wolfe is accused, and whether these subjective claims for breach of fiduciary duty and "outrageous conduct" are the least restrictive means of guarding that compelling state interest (if any).

Focusing on the conduct actually supported by the evidence, there simply is no compelling state interest present in this case, which could serve to justify the burden placed on the defendant's free exercise of religion.[11] However, if there is some state interest, that

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[11] Although the issue as framed takes religious motivation as a given, the determination of whether there is a compelling state interest in regulating the conduct may depend at a visceral level on the nature of the conduct alleged. In this case, plaintiffs' counsel have consistently tried to portray this as a case involving sexual abuse of the minor plaintiff during pastoral counseling. Much of the expert testimony presented by plaintiffs' counsel was designed to foster that impression. See

would require a balancing of interests, including consideration of whether these subjective common law claims are the least intrusive means of protecting the ostensible "compelling state interest."

In this regard, it is useful to look back to *Cantwell v. Connecticut, supra,* which involved a criminal prosecution on a common law offense of inciting a breach of the peace. There the court noted that the conviction was not based on a narrowly drawn statute evincing a specific legislative judgment, which would be more likely to hold up. Instead, the court noted "the judgment is based on a common law concept of the most general and undefined nature." 60 S.Ct. at 905. Thus, even though the court recognized a state interest there, it concluded that this vague, subjective common law remedy was not calculated to protect that interest:

> "Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.
>
> . . . .

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the testimony summarized in Argument D.3. in the Amended Opening Brief of Appellant Homer Wolfe in the Court of Appeals, at pp. 42-43. See, also, the Appellee's Answer Brief to Defendant-Appellant Homer Wolfe in the Court of Appeals, at pp. 1-2, 7-9, 17. In fact, the record *does not* support the plaintiffs' characterization. See the analysis at pages 11 through 18 in the Reply Brief of Appellant Homer Wolfe in the Court of Appeals. For convenient reference, a copy is attached hereto marked as Appendix C.

> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

60 S.Ct at 905, 906. To whatever extent the state is considered to have a compelling interest in regulating conduct in the context of pastoral counseling, a civil cause of action which depends on a subjective standard of conduct simply cannot be considered the least intrusive means of advancing the compelling state interest.

In this case, the trial court suggested the flogging of a counselee by a pastoral counselor as one example of conduct so extreme as to be subject to regulation by the state. [Vol. 6, 32:10-16.] In that hypothetical situation, the appropriate means of regulating that conduct would most likely be the enforcement of a facially neutral *criminal* statute of general application. It is conceivable that, in a case involving such harmful or offensive physical contact by a pastoral counselor with a counselee, a *civil* action for battery might be accepted as a least intrusive means of dealing with that conduct. In *Schmidt v. Bishop, supra*, the court did state that "The facts alleged in the complaint support clearly an action for a battery or some similar intentional tort," and that "existing laws against battery, and the criminal statute against sexual abuse if timely

invoked, provide adequate protection for society's interests." 779 F.Supp. at 324, 328. The Missouri Supreme Court seems to have drawn the line in that manner, in the case of *Hester v. Burnett*, 723 S.W.2d 544, 554 (Mo.App. 1987), holding that intentional tort claims may be brought against a clergyman, but that other claims cannot. Even if John DeBose had a colorable civil claim for battery, however, opening the door for that claim would not open the door to subjective fiduciary duty and outrageous conduct claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Combined Opening/Answer Brief of Respondent/Cross-Petitioner Homer Wolfe have been served on counsel of record this 27th day of November, 1995, by placing same in the United States mail, postage prepaid, addressed as follows:

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APPENDIX V

SUPREME COURT, STATE OF COLORADO

Case No. 95-SC-42

RESPONDENT WOLFE'S PETITION FOR REHEARING

BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE AND J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

CERTIORARI REVIEW OF A DECISION FROM THE COLORADO COURT OF APPEALS (Court of Appeals Case No. 92-CA-1929)

TRIAL JUDGE: Herbert L. Stern, III, Denver District Court Judge

COURT OF APPEALS JUDGE WHO AUTHORED THE OPINION OF THE COLORADO COURT OF APPEALS:

John A. Criswell, Appellate Judge

OTHER JUDGES WHO PARTICIPATED IN THE APPELLATE RULING:

Daniel M. Taubman, Appellate Judge (Concurring)
Janice B. Davidson, Appellate Judge (Dissenting)

COMES NOW respondent/cross petitioner Homer Wolfe, by and through his attorneys, Hibschweiler & Johnson, and submits this Petition for Rehearing pursuant to Rule 40, Colorado appellate Rules.

ISSUES PRESENTED FOR REVIEW

The opinion issued by this court identified three issues on which the Court of Appeals was reversed: (1) the ruling that, on the evidence presented, the defendants were entitled to jury instructions relating to free exercise of religion (under the First Amendment or the Religious Freedom Restoration Act); (2) the ruling that the verdict forms were defective, so as to require a new trial; and (3) the ruling that it was error to admit certain expert testimony. Respondent Wolfe requests rehearing on all these issues.

ARGUMENT

The holding concerning the First Amendment and evidentiary issues flow from court's ruling that Wolfe demonstrated no arguable religious motivation for administration of massage to counselees. (In fact, the Colorado Supreme Court has now rejected any claim of religious motivation, in the absence of an articulated "religious belief" requiring the conduct in question.) Defense counsel respectfully submit that there was a sufficient showing of religious motivation to require jury

instructions on the "free exercise" issue. As the Court of Appeals noted, it was properly a question for the jury to decide whether the asserted religious motivation (facilitating counselees' communication with the Supreme Being) was sincere. However, there was a sufficient articulation of religious motivation to require a jury instruction.

In footnote 10, Justice Lohr rejects defense counsel's assertion that the grant of certiorari took the existence of religious motivation as given. With all due respect, defense counsel submit that a fair reading of the first issue on which certiorari was granted indicates that the issue to be reviewed by the Colorado Supreme Court was the conceptual question of whether the First Amendment provides a defense to tort claims under the specified circumstances, i.e., "if the alleged tortious conduct is motivated by a sincerely held religious belief" [emphasis added]. To frame the issue of whether defendant Wolfe had articulated a colorable "religious motivation," sufficient to raise a jury question, the logical phrasing would have been "whether the alleged tortious conduct was motivated by a sincerely held religious belief," or "whether the defendant made a sufficient showing to create a question of fact as to whether the alleged tortious conduct is motivated by a sincerely held religious belief." As it is, the questioned proposition was not whether the conduct was motivated by a sincerely held religious belief, but whether the Free Exercise Clause provides a defense to tort claims under those circumstances. If the court intended to review the existence of an asserted religious motivation, the grant of certiorari should at least have been expressed by stating the predicate in the

past tense (i.e., "if the alleged tortious conduct *was* motivated by a sincerely held religious belief"). Because defense counsel understood that the existence of motivation by a sincerely held religious belief was assumed in the grant of certiorari, that issue was not extensively briefed in the Supreme Court. (See Argument A.1.c. in Wolfe's Combined Opening/Answer Brief, Argument A.1. in Wolfe's Reply Brief Responding to the Deboses' Extra Answer Brief, and Argument A.4. in Wolfe's Final Reply Brief.) Under either the Free Exercise Clause itself, or under R.F.R.A. (42 U.S.C. §2000bb), defense counsel submit that a religious motivation was sufficiently demonstrated. See *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); *Haff v. Cooke*, 923 F.Supp. 1104 (E.D. Wis. 1996); *Muslim v. Frame*, 891 F.Supp. 226 (E.D.Pa. 1995), and 897 F.Supp. 215 (E.D.Pa. 1995); and *Jesus Center v. Farmington Hills Zoning Board of Appeals*, 544 N.W.2d 698 (Mich. App. 1996).

Since it is now apparent that this court has revisited the threshold question of religious motivation, defense counsel respectfully request a rehearing, so that this issue can be fully briefed.[1]

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[1] As far as respondent Wolfe is affected, the court's ruling that there was no religious motivation as a matter of law enabled the court to dispense with all the free exercise and evidentiary issues which had been raised. (See Footnote 12 in the Opinion, and Section II.B. in the Opinion.) It is certainly true that free exercise protection is only triggered if there is some basis for arguing that the conduct in question was religiously motivated. Therefore, in the absence of a rehearing, the court's ruling is dispositive to free exercise issues, unless overturned by the United States Supreme Court. However, the evidentiary issues may also bear on the Establishment Clause issue. Based on earlier rulings by this court, the Court of appeals held that

With respect to the verdict form issue, defense counsel note that the potential duplication of damages would have been avoided if the plaintiffs has been required to make an election of remedies. Defense counsel proceeded with an understanding that an election of remedies would be required, but the trial court declined. That accounts for the sequence of events. *If* the trial court refused to require an election of remedies, the verdict forms would then be erroneous. Therefore, there was no waiver of this issue.

CONCLUSION

This Petition for Rehearing is filed primarily to assure that recourse to the United States Supreme Court on certiorari review is preserved. However, respondent Wolfe respectfully requests that this court grant a rehearing to reconsider the points noted above.

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there was no Establishment Clause issue, and this court denied certiorari on that issue. If and when a petition for certiorari is filed with the United States Supreme Court, it will include the Establishment Clause issue, including the issue of whether the substance of these causes of action and the evidence offered in support of the causes of action violate the Establishment Clause, by creating government regulation of the conduct of clergymen and religious institutions not in spite of their status as such, or without regard for their status as such, but *because* of their status as such.

Respectfully submitted

HIBSCHWEILER & JOHNSON

By _____

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Sheila E. Barthel, Reg. No. 21310
Attorneys for Respondent/
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent Wolfe's Petition for Rehearing have been served on counsel of record this 6th day of January, 1997, by placing same in the United States mail, postage prepaid, addressed as follows:

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APPENDIX W

Colorado Jury Instructions 2d (Civil)

Wills

31:16 FIDUCIARY RELATIONSHIP – DEFINED

A fiduciary relationship exists whenever a person in the position of a *(insert the most appropriate word or words, e.g., guardian, trustee, executor, agent, conservator, administrator, partner, joint venturer, etc.)* **has a legal power to affect the interests of another which have been entrusted to him. Such person is under a duty to deal with those interests with utmost good faith and solely for the benefit of the other.**

Notes on Use

This instruction should be used in conjunction with Instruction 31:14 and such other instructions, as for example Instruction 19:5, when a definition of "fiduciary relationship" is required.

This instruction sets out the technical definition of a fiduciary. In some situations (see, *e.g.*, cases cited in Source and Authority to Instruction 31:15), a fiduciary may also be in a confidential relationship as defined in Instruction 31:15. In such situations, that Instruction should be given in lieu of, or in conjunction with, this instruction, depending on the circumstances of the particular case.

Source and Authority

This instruction is based on RESTATEMENT 2d, TRUSTS § 2, Comment b (1959) and McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960) (real estate agent); Midwest Mutual, Inc. v. Heald, 106 Colo. 552, 108 P.2d 535 (1940) (attorney); and Mountain States Beet Growers Marketing Ass'n v. Monroe, 84 Colo. 300, 269 P. 886 (1928) (trustee).

APPENDIX X

Colorado Jury Instructions 3d (Civil)

CHAPTER 26. BREACH OF FIDUCIARY DUTY

26:1 ELEMENTS OF LIABILITY

In order for the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of breach of fiduciary duty, you must find that all of the following have been proved:

1. The defendant was acting as a fiduciary of the plaintiff with respect to (*insert appropriate description of the subject matter, e.g., "sale of plaintiff's house"*);

2. *The defendant breached a fiduciary duty to the plaintiff;*

3. *The plaintiff incurred (injuries) (damages) (losses); and*

4. *The defendant's breach of fiduciary duty was a cause of the plaintiff's (injuries) (damages) (losses).*

If you find that any one or more of these (*number*) propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff (unless you also find that the defendant's affirmative defense of [*insert any affirmative defense that would be a complete defense to the plaintiff's claims*] has been proved by a preponderance of the evidence, in

which event, your verdict must be for the defendant).

Notes on Use

Omit any numbered paragraph the facts of which are not in dispute.

If there is a dispute as to whether the defendant was acting as a fiduciary of the plaintiff, Instruction 26:2A or 26:2B should be given with this instruction together with any additional instructions that may be required, *e.g.*, Instruction 7:3, defining "agent" and "principal". If there is no such dispute, the first numbered paragraph should be omitted and only the first sentence of Instruction 26:2A should be given.

For a discussion as to when the court may, in effect, direct a verdict as to the existence of a fiduciary relationship and the subject matter of such a relationship, see Paine, Webber, Jackson & Curtis, Inc., v. Adams, 718 P.2d 508, at 518-19 (Colo. 1986).

Whenever this instruction is used, Instruction 26:3, advising the jury as to the specific duty or duties of a fiduciary, must also be given.

Appropriate instructions defining other terms used in this instruction must also be given, *e.g.*, an instruction or instructions relating to causation. See Instructions 9:26-9:30.

Use whichever parenthesized words are appropriate.

If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a

defense, the parenthesized portion of the last paragraph should be omitted.

Though mitigation of damages is an affirmative defense (see Instruction 5:2), only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraph of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

A fiduciary duty may arise out of a confidential relationship. Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755 (Colo. App. 1988) (*cert. den.*); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. App. 1981). However, the existence of a confidential relationship, without more, is insufficient to establish a fiduciary duty. Bock v. Brody, 870 P.2d 530 (Colo. App. 1993), *aff'd in part and rev'd in part on other grounds,* Brody v. Bock, 897 P.2d 769 (Colo. 1995); First Nat'l Bank v. Theos, 794 P.2d 1055 (Colo. App. 1990) (*cert. den.*). Moreover, under Colorado law, there is no separate tort for breach of a confidential relationship. Bock v. Brody, *supra,* Todd Holding Co. v. Super Valu Stores, Inc., 874 P.2d 402 (Colo. App. 1993). To establish the existence of a fiduciary duty arising out of a confidential relationship, it must be shown that: (1) the plaintiff justifiably reposed a special trust or confidence in the defendant; (2) the defendant either invited, ostensibly accepted or acquiesced in the reposing of such trust; and (3) the defendant assumed a duty to act for the benefit of or in the best interests of the plaintiff with respect to the subject matter of the trust. First Nat'l Bank

v. Theos, *supra*. See Crystal Homes, Inc. v. Radetsky, 895 P.2d 1170 (Colo. App. 1995); Jarnagin v. Busby, Inc., 867 P.2d 63 (Colo. App. 1993).

If plaintiff is alleging the existence of a fiduciary duty arising out of a confidential relationship, Instruction 26:2B should be given illegible instruction. See also Instruction 34:15 defining "confiden illegible.

This instruction does not apply to claims for relief that are equitable rather than legal. *Compare* Kaitz v. Dist. Court, 650 P.2d 553 (Colo. 1982) *with* Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, at 514 n.5 (Colo. 1986). See also Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc., 697 P.2d 1139, 1140 (Colo.App. 1985) ("Although fiduciary obligations are equitable in nature, the remedies [for breach] are generally at law.").

Because an action for damages for breach of a duty not to disclose confidential information lies in tort, and is legal rather than equitable, it will support a claim for punitive damages. Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755 (Colo.App. 1988); Virdanco, Inc. v. MTS Int'l, 820 P.2d 352 (Colo. App. 1991) (where primary purpose of action for breach of fiduciary duty was to recover compensatory damages, such action was primarily legal and, therefore, exemplary damages were recoverable even though plaintiff also sought equitable remedy of accounting).

For a discussion of the elements necessary to establish the tort of aiding and abetting a breach of a fiduciary duty, see Holmes v. Young, 885 P.2d 305 (Colo. App. 1994) (*cert. den.*)

Source and Authority

This instruction is based on Rupert v. Clayton Brokerage Co. of St. Louis, 737 P.2d 1106 (Colo. 1987); Paine, Webber, Jackson & Curtis, Inc. v. Adams, *supra*; Kunz v. Warren, 725 P.2d 794 (Colo.App. 1986); Brunner v. Horton, 702 P.2d 283 (Colo.App. 1985); Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc., *supra*. See also Destefano v. Grabriam, 763 P.2d 275, 284, 289 (Colo. 1988); Bithell v. Western Care Corp., 762 P.2d 708 (Colo.App. 1988) (*cert. den.*); Graphic Directions, Inc. v. Bush, *supra*.

26:2A FIDUCIARY RELATIONSHIP – DEFINED (formerly 26:2)

A fiduciary relationship exists whenever one person is entrusted to act for the benefit of or in the interests of another and has the legal (power) (authority) to do so.

If you find that the defendant, (*name*), was acting as (a) (an) (*insert appropriate description, e.g., "attorney", "partner", "joint venturer", "agent", etc.*) of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter, e.g., "sale of plaintiff's house"*), then you are instructed that the defendant was acting as a fiduciary of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter*).

Notes on Use

When, based on undisputed facts, the court determines as a matter of law that the defendant was acting as a fiduciary for the plaintiff with respect to the subject matter of the suit, the jury should also be instructed that the court has determined that a fiduciary relationship existed between the parties. However, when the alleged relationship between the parties, if proven, would establish the existence of a fiduciary relationship as a matter of law, but the facts giving rise to such a relationship are in dispute, then the second paragraph of this instruction should also be given. Depending on the nature of the fiduciary relationship alleged and the particular facts in dispute, this instruction may have to be appropriately modified.

If plaintiff is claiming that the fiduciary duty arose out of a confidential relationship and there is sufficient evidence to support such a claim then, Instruction 26:2B rather than this instruction should be used.

Source and Authority

This instruction is based on RESTATEMENT (2D,) OF TRUSTS § 2, Comment b (1959); McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960) (real estate agent); Midwest Mutual, Inc. v. Heald, 106 Colo. 552, 108 P.2d 535 (1940) (attorney); Mountain States Beet Growers Marketing Ass'n v. Monroe, 84 Colo. 300, 269 P. 886 (1928) (trustee). See also Howard v. Hester, 139 Colo. 255, 338 P.2d 106 (1959) (attorney and real estate agent); Hart v. Colorado Real Estate Comm'n, 702 P.2d 763 (Colo. App.

1985) (agent as a fiduciary); Brunner v. Horton, 702 P.2d 283 (Colo. App. 1985) (same).

26:3 DUTIES OF FIDUCIARY – DEFINED

If you find that the defendant, (*name*) was acting as a fiduciary of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter, e.g., sale of plaintiff's house*), then you are instructed that the defendant owed the following (duty) (duties) to the plaintiff:

(*Insert as required, in separately numbered paragraphs if there are more than one, an appropriate description of the duty or duties which would be*

Notes on Use

This instruction should be used in conjunction with Instruction 26:1 to describe the fiduciary duty or duties the plaintiff claims the defendant breached and the breach of which, under the applicable law and evidence in the case, would be appropriate for the jury to determine. The court determines as a matter of law the nature of the specific duties owed by the fiduciary. DeBosse v. Bear Valley Church of Christ, 890 P.2d 214, 225 (Colo. App. 1994) (*cert. granted* 1995) (citing instruction).

Use whichever parenthesized words in the first paragraph are appropriate.

Illustrative insertions for the second paragraph are the duty of an agent "to disclose to the principal all facts

relative to the subject matter of the agency which might reasonably affect the principal's decision," Kunz v. Warren, 725 P.2d 794 (Colo.App. 1986); the duty of a trustee "to seek to obtain the best price obtainable for the trust property when selling it," Murphy v. Central Bank & Trust Co., 699 P.2d 13 (Colo.App. 1985); and the duty of an agent "not to sell products of his principal on credit without first making reasonable inquiry as to the financial circumstances of the buyer," Brunner v. Horton, 702 P.2d 283 (Colo.App. 1985). Van Schaack Holdings, Ltd. v. Van Schaack, 867 P.2d 892 (Colo. 1994) (fiduciary duty of officer or director of closely held corporation when purchasing stock of minority shareholder); Vento v. Colorado Nat'l Bank-Pueblo, 907 P.2d 642 (Colo. App. 1995) (*cert. den.*) (duties of trustee to beneficiaries); River Management Corp. v. Lodge Props., Inc., 829 P.2d 398 (Colo. App. 1991) (majority shareholders and directors in a close corporation owe the highest degree of fidelity and confidence to minority shareholders and cannot exercise corporate power in bad faith or for their own advantage). See also Rifkin v. Platt, 824 P.2d 32 (Colo. App. 1991) (director owes fiduciary duty to corporation but has broad discretion in making decisions for corporation and cannot be held liable for legitimate business decisions made in good faith unless such decisions were made for director's own personal interest or advantage); Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990) (*cert. den.*) (fiduciary duties of husband who had discretionary control of former wife's shares of stock in corporation required him to act with prudence, reasonableness and equity with respect to sale of such shares, to seek the best price possible for such shares, and not to allow his own

motives to interfere with the discharge of those duties). For other cases describing various duties, see Source and Authority below.

For several illustrative common-law duties an agent may owe his or her principal, see RESTATEMENT 2d, AGENCY §§ 377-398 and 422-431 (1958). See also Life Care Ctrs. of Am., Inc. v. East Hampden Assocs. Ltd. Partnership, 903 P.2d 1180 (Colo. App. 1995) (*cert. den.*) (duties of agent); Winston Fin. Group, Inc. v. Fults Management, Inc., 872 P. 2d 1356 (Colo. App. 1994) (unless parties agree otherwise, customs normally found in agency relationship determine scope of agent's duties).

A fiduciary duty may be imposed by statute. Alexander Co. v. Packard, 754 P.2d 780 (Colo.App. 1988) (applying § 38-22-127, C.R.S. (repl.v. 1982). Another statutory example is § 15-1-304, C.R.S. (repl.v. 1987) (standard for making investments). A fiduciary duty may also arise out of a confidential relationship. Alexander Co. v. Packard, *supra*. See also Buder v. Sartore, 774 P.2d 1383 (Colo. 1989) (discussing and comparing three statutory standards for making investments).

The existence of a fiduciary relationship between a personal representative and the beneficiaries of an estate does not relieve the personal representative of contractual obligations of the decedent. Colorado Nat'l Bank v. Friedman, 846 P.2d 159 (Colo. 1993).

Source and Authority

This instruction is based on McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960); Brunner v. Horton,

supra; RESTATEMENT 2d, AGENCY § 13, Comment a (1958). See also Jet Courier Service, Inc. v. Mulei, 771 P.2d 486 (Colo. 1989) (discussing various aspects of an employee's duty of loyalty when employee preparing to leave employer and establish a competing business); Steeby v. Fial, 765 P.2d 1081 (Colo.App. 1988) (fiduciary duties between partners continue until partnership assets have been divided and liabilities satisfied); T-A-L-L Inc. v. Moore & Co., 765 P.2d 1039 (Colo.App. 1988), *aff'd with modification*, 792 P.2d 794 (Colo. 1990) (duty of real estate agent to disclose facts to principal and duty not to disclose confidential information to third persons); Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755 (Colo.App. 1988) (discusses scope of duty of bank not to disclose financial condition of customers and depositors); Collie v. Becknell, 762 P.2d 727 (Colo.App. 1988) (*cert.den.*) (duties of corporate officers not to usurp corporate opportunities or divert corporate property to own benefit); Rupert v. Clayton Brokerage Company of St. Louis, Inc., 737 P.2d 1106, 1109 (Colo. 1987) (discusses various duties owed to a customer by an investment broker when handling a discretionary account as a fiduciary); Roeschlein v. Watkins, 686 P.2d 1347, 1350 (Colo.App. 1984) (*cert.den.*) ("A general partner, in winding up partnership affairs, owes his limited partners a common law fiduciary duty of good faith, sound business judgment, candor, forthrightness, and fairness."); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S.Ct. 2153, 128 L. Ed. 2d 880, (1994) (once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner); Destefano v. Grabrian, 763

P.2d 275 (Colo. 1988) (priest acting as a marriage counselor to parishioner had duty to act "with utmost good faith and solely for benefit" of parishioner); Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (Colo. App. 1993) (cert. den.) (employee's duty of loyalty); Cole v. Jennings, 847 P.2d 200 (Colo. App. 1992) (*cert. den.* 1993) (real estate broker); Estate of McCart, 847 P.2d 184 (Colo. App. 1992) (*cert. den.* 1993) (trustee); McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo. App. 1989) (joint venturers owe each other fiduciary duties of loyalty and of fair, open and honest disclosure); Tucker v. Ellbogen, 793 P.2d 592 (Colo. App. 1989) (*cert. den.*) (managing partner has a fiduciary duty to wind up partnership affairs as expeditiously as possible so as not to cause waste); Koontz v. Rosener, 787 P.2d 192, 195 (Colo. App. 1989) (while an employee may have a privilege to prepare or make arrangements to compete with the employer prior to leaving that employment, the nature of those preparations is significant in determining whether the employee may have breached his or her duty of loyalty to the employer).

For what, on the other hand, does not constitute a fiduciary duty, see Schenck v. Van Ningen, 719 P.2d 1100 (Colo.App. 1986) (real estate agent not under a duty to discover for benefit of purchaser that county intended to condemn part of the property).

APPENDIX Y

26:2B FIDUCIARY RELATIONSHIP ARISING OUT OF A CONFIDENTIAL RELATIONSHIP – ELEMENTS (NEW INSTRUCTION)

In order to find that the defendant, (*name*), was acting as a fiduciary of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter, e.g., sale of plaintiff's house*) you must find that all of the following have been proved:

1. The plaintiff placed (trust) (or) (confidence) in the defendant with respect to (*insert appropriate description of subject matter*);

2. The plaintiff acted reasonably in placing such (trust) (or) (confidence) in the defendant;

3. The plaintiff's trust) (or) (confidence) was (accepted) (invited) (acquiesced in) by the defendant; and

4. The defendant (agreed) (undertook) (purported) to act for the benefit of the plaintiff with respect to (*insert appropriate description of subject matter*).

Notes on Use

When, as a matter of law, the relationship between the plaintiff and the defendant with respect to the subject matter is a fiduciary one, the first sentence of Instruction 26:2A, rather than this instruction, should be used. Also, Instruction 26:2A should be used, rather than this instruction, when the claimed fiduciary duty is based on a relationship that is recognized, as a matter of law, as being a fiduciary relationship, such as exists between

agent and principal, partners, joint venturers, attorney and client, etc. See, generally, Chapter 7 of these instructions.

In all cases involving a fiduciary relationship arising out of a confidential relationship, the four elements of this instruction must be proven by the plaintiff. However, because fiduciary relationships have been found to arise in diverse situations, the court may need to consider the adequacy of this instruction in light of the particular facts of the case. For example, a fiduciary duty has been found where one party occupied a superior position over the other, and thus, was in a position to influence or affect the interests of the other. Moses v. Diocese, of Colo., 863 P. 2d 310 (Colo. 1993) *cert. den.*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed. 2d 880 (1994). A fiduciary duty has been found where one person has practical control over the affairs of another. Paine, Webber, Jackson & Curtis v. Adams, 718 P. 2d 508 (Colo. 1986). A fiduciary duty may arise from a business or confidential relationship which compels or induces one party to relax the care and vigilance one would ordinarily exercise in dealing with a stranger. Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. App. 1981). A fiduciary relationship can arise out of a relationship of blood, business, friendship or other association. Moses v. Diocese of Colo., *supra*. Accordingly, although the Committee believes that elements one through four of this instruction are required to establish the existence of a fiduciary duty arising out of a confidential relationship in all cases, nevertheless, this instruction may need to be appropriately modified or supplemented to better reflect the law applicable to specific factual situations.

A prerequisite to finding a fiduciary duty is the existence of a fiduciary relationship. Moses v. Diocese of Colo., 863 P. 2d 310, 321 *cert. den.*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed. 2d 880 (1994) (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 2153, 128 L. Ed. 2d 880, (1994) (record supported jury's determination that a fiduciary relationship existed between bishop and parishioner where there was evidence that bishop occupied superior position over parishioner, was able to exert substantial influence over parishioner and assumed a duty to act in the best interests of the parishioner).

For other cases in which the existence of a fiduciary relationship was in issue, see Destefano v. Grabrian, 763 P. 2d 275 (Colo. 1988) (priest acting as a marriage counselor had a fiduciary relationship to both husband and wife with respect to their marital relationship); Paine, Weber, Jackson & Curtis v. Adams, 718 P. 2d 508 (Colo. 1986) (stockbroker who had practical control over customer's account had fiduciary duty to customer with respect to handling account); Johnston v. CIGNA Corp., 916 P.2d 643 (Colo.App. 1996) (generally, investment adviser owes fiduciary duty to customers); Emenyonu v. State Farm Fire & Cas. Co., 885 P. 2d 320 (Colo. App. 1994) (contractual relationship between an insurer and its insured does not give rise to a fiduciary relationship with respect to first party disputes); Wells Fargo Realty Advisers Funding, Inc. v. Uioli, Inc., 872 P. 2d 1359 (Colo. App. 1994) (no fiduciary relationship between borrower and lender where borrower did not repose special trust in lender or relax care and vigilance that borrower would have ordinarily exercised); Bock v. Brody, 870 P.2d 530 (Colo. App. 1983), *aff'd in part and rev'd in part on other*

grounds, Brody v. Bock, 897 P.2d 769 (Colo. 1995) (evidence of close business and personal relationship, without more, is insufficient to establish a fiduciary relationship); Jarnigan v. Busby, Inc., 867 P. 2d 63 (Colo. App. 1993) (no fiduciary relationship between parties where there was no evidence that plaintiff reasonably reposed trust and confidence in defendant); Graphic Directions, Inc. v. Bush, 862 P. 2d 1020 (Colo. App. 1993) (*cert. den.*) (art director of graphics business owed fiduciary duty to employer); Nicholson v. Ash, 800 P. 2d 1352 (Colo. App. 1990) (evidence was insufficient to establish a fiduciary relationship where no confidential relationship existed between the parties prior to the date of the business transaction that gave rise to the claim); First Nat'l Bank v. Theos, 794 P. 2d 1055 (Colo. App. 1990) (*cert. den.*) (trial court erred in failing to instruct jury that to establish fiduciary relationship between bank and borrower, borrower had to show that he justifiably reposed a special trust or confidence in bank to act in borrower's best interest; that bank either invited, ostensibly accepted or acquiesced in such trust; and that bank assumed a duty to act in borrower's interest with respect to subject matter of trust); Rubenstein v. South Denver Bank, 762 P. 2d 755 (Colo. App. 1988) (*cert. den.*) (trial court erred in entering summary judgment dismissing plaintiff's claim against bank for breach of fiduciary duty since there were controverted issues of material fact regarding the existence of such relationship); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P. 2d 21 (Colo. App. 1981) (same); Breedon v. Dailey, 40 Colo. App. 70, 574 P. 2d 508 (1978) (where employment agreement gave the defendant the power to make financial commitments in unlimited amounts on

plaintiff's behalf and without prior approval, a fiduciary relationship existed between the parties as a matter of law). See also Circle T Corp. v. Deerfield, 166 Colo. 238, 444 P. 2d 404 (1968); Alexander v. Packard, 754 P. 2d 780 (Colo. App. 1988); Meyer v. Schwartz, 638 P. 2d 821 (Colo. App. 1981) (*cert. den*).

Source and Authority

See authorities cited above.

APPENDIX Z

Colorado Jury Instruction 3d (Civil)

Emotional Distress

23:1 ELEMENTS OF LIABILITY

In order for the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of extreme and outrageous conduct, you must find all of the following have been proved:

1. The defendant engaged in extreme and outrageous conduct;

2. The defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress, and

3. The plaintiff incurred severe emotional distress which was caused by the defendant's conduct.

If you find that any one or more of these *(number)* propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff (unless you should also find that the defendant's affirmative defense of *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]* has been proved by a preponderance of the evidence, in which event, your verdict must be for the defendant).

23:2 EXTREME AND OUTRAGEOUS CONDUCT – DEFINED

Extreme and outrageous conduct is conduct which is so outrageous in character, and so

extreme in degree, that a reasonable member of the community would regard the conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community. Such outrageous conduct occurs when knowledge of all the facts by a reasonable member of the community would arouse that person's resentment against the defendant, and lead that person to conclude that the conduct was extreme and outrageous.

(A series of acts may constitute outrageous conduct, even though any one of the acts might be considered only an isolated unkindness or insult.) (A simple act of unkindness or insult, standing alone, does not constitute outrageous conduct. However, a single incident may constitute outrageous conduct if the incident would be so regarded by a reasonable member of the community.)

(The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity. To proceed in the face of such knowledge may make one's conduct extreme and outrageous, although the same conduct in the absense of such knowledge would not be so regarded. The fact, however, that a person knows that another person will regard the conduct as insulting or will have his or her feelings hurt does not alone make conduct extreme and outrageous.)

APPENDIX AA

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION[1]

AMENDMENT [1.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

AMENDMENT XIV.

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therin shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

APPENDIX BB

PL 103-141, November 16, 1993, 107 Stat 1488
(cite as: 107 Stat 1488)

UNITED STATES PUBLIC LAWS
103rd Congress – First Session
Convening January 5, 1993
CPR. (C) WEST 1993 No. Claim to Orig. Govt. Works

Additions and Deletions are not identified in this document. For Legislative History of Act, see LH database or Report for this Public Law in U.S.C.C. & A.N. Legislative History section.

PL 103-141 (HR 1308)
November 16, 1993
RELIGIOUS FREEDOM RESTORATION ACT OF 1993

An Act to protect the free exercise of religion.

So it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

< 42 USCA s 2000bb NOTE >

SECTION 1. SHORT TITLE

This Act may be cited as the "Religious Freedom Restoration Act of 1993"

< 42 USCA s 2000bb >

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS. – The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings as a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES. – The purposes of this Act are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application

in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

< 42 USCA s 2000bb-1 >

SEC. 3. FREE EXERCISE-OF RELIGION PROTECTED.

(a) IN GENERAL. – Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION. – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – *1489

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF. – A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

< 42 USCA s 1988 >

(A) JUDICIAL PROCEEDINGS. – Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

< 5 USCA s 504 >

(b) ADMINISTRATIVE PROCEEDINGS. – Section 504(b)(1)(C) of title 5, United States Code, is amended –

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

< 42 USCA s 2000bb-2 >

SEC. 5. DEFINITIONS.

As used in this Act –

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

< 42 USCA s 2000bb-3 >

SEC. 6. APPLICABILITY.

(a) IN GENERAL. – This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION. – Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED. – Nothing in this Act shall be construed to authorize any government to burden any religious belief.

< 42 USCA s 2000bb-4 >

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religious (referred to in this section as the "Establishment Clause(). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this *1490 Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.

PL 103-141, 1993 HR 1308

Supreme Court, U.S.
FILED
APR 21 1997
CLERK

No. 96-1605
No. 96-1637

In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,
a non-profit Colorado corporation,
Petitioner,

v.

DENISE DeBOSE and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, and HOMER WOLFE,
Respondents.

HOMER WOLFE,
Petitioner,

v.

DENISE DeBOSE, JOHN DEBOSE, and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,
Respondents.

On Petitions For Writ of Certiorari To The Supreme Court of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a church organization or its minister is exempt from tort liability for secular conduct that does not burden the free exercise of religion, and no record evidence indicates that the petitioners' tortious conduct was rooted in any religious belief.

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OPINION BELOW

The opinion of the Colorado Supreme Court (Pet. App. A to Bear Valley's petition) affirming a jury verdict in favor of respondents Denise DeBOSE and J.D.B. is reported at *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996). The Colorado Supreme Court denied Petitions for Rehearing on January 13, 1997. Pet. App. B.

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 125(3), through two separate Petitions, 96-1605 and 96-1637.

STATEMENT OF THE CASE

Respondents, Denise DeBose and J.D.B., filed suit against the Bear Valley Church of Christ ("Bear Valley") and Homer Wolfe ("Wolfe"), a Bear Valley minister. Their claims against Wolfe included breach of fiduciary duty, and outrageous conduct based on the minister's sexual touching of minor child J.D.B. that grew out of Wolfe's counseling of the child. Their claims against Bear Valley included breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision based on the antecedent knowledge of Bear Valley that Wolfe had sexually approached other

vulnerable children. The tortious conduct aggravated preexisting physical and emotional conditions causing the DeBoses to become ill.

The jury returned verdicts of breach of fiduciary duty against both petitioners and for both respondents. In addition, verdicts of outrageous conduct and negligent hiring or supervision were returned for the minor child, as set forth in Pet. App. C to Bear Valley's petition. The jury also found that the statute of limitations on the negligence claim had expired as to Denise DeBose.

The facts underlying the DeBoses' claims are recounted in the opinion of the Colorado Supreme Court, Pet. App. A at 2a-10a. The DeBoses incorporate those facts by reference. No evidence connected touching genitals or rubbing thighs with religious motivation.

Four sets of facts alleged by Bear Valley in its petition are incorrect.

First, at page 5, Bear Valley quotes at length J.D.B.'s testimony that he did not recall seeing Wolfe in 1987 or 1988, and apparently extrapolates from that testimony an incorrect "fact" that no counseling sessions, and therefore no sexual contact, occurred in those years. Bear Valley ignores the undisputed evidence of others, including Wolfe, that he counseled the child with increasing frequency into 1988. Wolfe's calendar (Trial Exhibit 9) recorded 1988 sessions as twice in January, twice in February, three times in March, three times in April and once in May.

Second, at footnote 6, Bear Valley contends that the minor child alleged "only one incidental contact with his genitals." The record is exactly the opposite. As set forth in pages 3a-4a of Pet. App. A, at trial the child related that Wolfe regularly "would rub my leg up to my side and just touch my penis" and his "privates." Bear Valley's claim at footnote 6 that the boy's comments to Dr. Henry Frey, a psychiatrist who conducted an independent examination for Bear Valley, was "180 degrees" different from the child's testimony at trial is also inaccurate. J.D.B. told Dr. Frey that Wolfe required him to take his shirt off, and that Wolfe's rubbing of the child, including under his shorts, was "like caressing." XIII:142. Dr. Frey never asked the child where Wolfe had touched him, and J.D.B. did not volunteer that information to Dr. Frey.

Third, Bear Valley's assertion at page 28 that there were no allegations of misconduct against Wolfe before he was fired in 1988, is in error. In its minutes of April of 1986, the elders questioned Wolfe's "medical counseling." Ex. 4a Tab 5(l). In addition, in June of 1987, Gary and Mary Wygal told the elders directly that Wolfe had asked their fourteen year old son to expose his genitals to Wolfe during counseling. VIII: 9-12. Through 1987, Wygal continued to complain to the elders about Wolfe's unusual touching of children. VIII: 35-40. In early 1988, another father, Owen Dean, told the elders that his son had been inappropriately touched by Wolfe. XII: 30. After talking with the boy, the Wygals told the elders that Wolfe had asked to physically examine David Dean, and wanted "to get into his (Dean's) pants with his hands." VIII: 27-28; 186.

Fourth, Bear Valley claims that it discontinued Wolfe's counseling of children in March of 1988, when a letter was sent to Wolfe to that effect. The elders did nothing to tell the congregation of the suspension. XII:169 and XIII:110. The elders almost immediately reinstated his counseling duties without investigation, and children including DeBose continued to receive counseling from Wolfe through June of 1988. IX:99-100.

Facts alleged by Wolfe in his petition are also incorrect.

First, at page 10, Wolfe says that he has always maintained that "any touching of John DeBose was religiously motivated." In fact, both before and during trial, Wolfe denied ever touching J.D.B. The massage that he described giving other children, according to Wolfe, was aimed at communication. However, as to J.D.B., the following question and answer were given at trial by Wolfe:

> Q. Didn't you massage that boy?
>
> A. I did not.

XIII:53: ll. 2-3. Wolfe testified specifically that he would not have massaged J.D.B. because it would not have provided any benefit to the boy. XIII:48.

Second, at page 6, Wolfe claims that, at trial, he "explained the religious underpinnings" of the techniques which he employed for inspection of the genitals of adolescent counselees. Wolfe cites 13:53:ll.7 - 54:ll. 5. The testimony referenced by Wolfe has nothing to do with

religious support for his technique of inspecting the genitals of adolescent counselees. Following is the testimony which Wolfe cites to explain his "religious underpinning":

> Q With Wade Wright, how did it come up to check Wade's circumcision? Did he bring it up?
>
> A. During the massage period I was talking to him constantly, and the whole purpose of it was for the purpose of concentrating on communication, and he was about to leave town. I wanted to have one last encouragement session to encourage him. He was a very good boy. I had a lot of respect for him. He had a great future ahead of him. I just wanted to talk to him about living a good Christian life, staying close to God, and talk to him about -- talk to him about dating, talk to him -- I don't remember the specifics. All of it was about things that would occur to him in connection with dating, and I urged him to watch out for the normal temptations.
>
> Q. And that's how checking his genitals -- to encourage him to watch out for temptations?
>
> THE COURT: You need to speak up a little bit, sir.
>
> A. There were occasions that it might be helpful for me to explore that part of his area of his life.
>
> Q. The genital area of his life? What area of his life were you exploring by checking his genitals.
>
> A. His sexuality and development sexually.

Wolfe's own citation to the record shows that he never posited a religious belief for the nudity and massage that he employed in counseling of Wade Wright or any other child.[1]

The Colorado Supreme Court determined that the evidence at trial was sufficient to support the DeBoses' claims for breach of fiduciary duty, outrageous conduct, and negligence in hiring and supervision.

The Colorado Supreme Court found that neither Wolfe nor the Bear Valley Church of Christ had asserted at trial that the tortious conduct complained of -- *i.e.*, Wolfe's touching of the genitals of J.D.B. and Bear Valley's decision to keep Wolfe's methods secret from the congregation, were motivated by any religious belief.

Rather, Bear Valley argued that the First Amendment to the United States Constitution prohibits subject matter jurisdiction where clergy hiring and supervision are involved, which argument was rejected by the Colorado Supreme Court. Homer Wolfe similarly argued that the First Amendment to the U. S. Constitution prohibits subject matter jurisdiction where the clergy provided counsel to a parishioner, which argument was also rejected by the Colorado Supreme Court.

[1]Wade Wright testified that Wolfe "felt my penis and genitals" for 20 to 30 seconds and that Wolfe "said that the doctors did a good job in circumcision." X:13, 18.

REASONS FOR DENYING THE PETITION

I. This case is not worthy of certiorari review because the Colorado Supreme Court's holding is consistent with this Court's well-established precedents.

The decision of the Colorado Supreme Court in this case raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

Neither the Church of Christ nor Homer Wolfe can argue that the Colorado Supreme Court ought to have examined evidence concerning the actual impact of tort liability on religious belief. Such weighing of evidence in this case is impossible because neither the Church of Christ nor Wolfe presented evidence showing whether and how their tortious conduct was required by their specific religious belief. The argument at trial, rather, was much as it is to this Court: Religious organizations and their ministers should be exempt from tort liability.

A. The Colorado Supreme Court followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Church of Christ has never provided record evidence or even specific allegations showing that its tortious conduct was rooted in any religious belief. Similarly, Wolfe has never provided record evidence or specific allegation showing that his tortious conduct was rooted in any religious belief. He claimed generally that his counseling was "biblically based", but failed to provide any religious motivation for the techniques that he used. Based on this record, the Colorado Supreme Court applied well-settled law to hold that the judgment in this case did not burden the free exercise of religion. This holding is consistent with every decision by this Court. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny both Bear Valley's petition and Wolfe's petition.

This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious belief. *See, e.g., Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989)(to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)(law does not burden free exercise rights unless it has a "tendency to coerce (Homer Wolfe and the Bear Valley Church) into

acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987)(burdened conduct must be "mandated by religious belief" to be protected by free exercise clause)(quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)("to have protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The party claiming a constitutional violation has the burden of proving that violation. Neither Bear Valley nor Wolfe have shown that conduct at issue was religious. Under all of this Court's well-established free exercise precedents, the First Amendment provides no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141. The Church of Christ and Wolfe have the burden of proving with record evidence that tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Bear Valley's claim at page 14 of its petition, that "the Colorado Supreme Court has entirely disregarded this (the compelling state interest) test," is inaccurate. The first question to be asked in deciding whether or not to consider applying a compelling state interest test is whether the conduct at issue is motivated by a religious belief. *Yoder, supra*, 406 U.S. at 215. Because neither Wolfe nor Bear Valley asserted religious motivation for the tortious conduct at issue, the Colorado Supreme Court properly held that there was no basis on which to consider a compelling state interest analysis. Pet. App. A, 11a-12a. The essence

of Bear Valley's argument is that, because it is a religious organization, everything it does must be motivated by religious belief. There is no testimony that the specific tortious conduct complained of -- Bear Valley's decision to keep secret from the congregation that their minister had been accused of sexually abusing children; the decision to tell those accusing the minister to keep the secret in order to allow Bear Valley to control the information; the decision to allow the minister to continue his methods without supervision and without investigation -- were motivated by any religious belief. Bear Valley's antecedent knowledge of the danger posed by Wolfe, not any religious belief, provided a basis for the tort claims against Bear Valley.

Moreover, mere assertion that a law burdens some practices that might conceivably be religious has never sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See* also *Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (10th Cir. 1988)(free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs.") The Free Exercise Clause of the First Amendment does not grant churches immunity from being sued in civil courts. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U. S. 619 (1986).[2]

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[2]Assuming the Church of Christ or Wolfe had established religious motivation, the free exercise clause would not bar Colorado from

The Church of Christ reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), at pages 14 through 16, and Wolfe's reliance on the same case at page 16 of his petition, are misplaced. In that case, there was no question but that the conduct at issue was religiously motivated -- record evidence showed that the conduct being regulated involved a specific religious ceremony. The question then turned to whether the law at issue was aimed at prohibiting that specific religious practice, which it clearly was. Equating a municipal ordinance specifically designed to prevent a religious practice with the neutral application of common law is nonsensical. In *Church of Lukumi*, this Court noted that the inquiry to determine whether a law was neutral is whether the "object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 2227. If the answer is "yes", the law is not neutral and requires a compelling state interest test. The object of the torts of negligence and breach of fiduciary duty is to provide compensation to plaintiffs injured by the tortious conduct of another. The torts are religion neutral and, even assuming the conduct at issue had been tied to religious belief, the First Amendment would be no defense pursuant to *Smith.*

At pages 19 and 20, the Church recasts DeBoses' claims into claims in which a civil court decided selection of clergy. The recasting is inaccurate. Consistent with federal and Colorado law, DeBoses' verdicts did not intrude into

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enforcing generally applicable religiously neutral rules that prohibit or burden even religiously motivated conduct. *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

the clergy selection process. They addressed only the decision by the Chruch of Christ to retain Wolfe in a position where he was given intimate access to young children in a counseling setting, when the Church had been directly told that his history placed those children at risk. By way of analogy, the same analysis would have applied if the Church had allowed Wolfe to drive buses filled with parishioners in situations where the Church knew that Wolfe had a history of driving carelessly. Freedom to select clergy is protected. Decisions by a religious employer to allow clergy involved in secular conduct to harm unsuspecting third parties, is not protected.

At pages 11 through 15 and 25-26 of the Bear Valley petition, the Church criticizes the Colorado Supreme Court generally for perceived internal inconsistencies in cases which that court has decided. A review of the cases cited shows that the Colorado court carefully and appropriately decided the cases cited by Bear Valley. *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996), involved a minister who sued her church concerning her ministry. The Colorado Supreme Court held that the choice of minister is protected. Nothing in that decision runs contrary to this Court's jurisprudence, or to the Colorado Supreme Court rulings in *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993), *cert. den.*, ____U.S. ____, 114 S.Ct. 2135 (1994), *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) or *Bohrer v. DeHart*, ___ P.2d ___ (Colo. App. 1996). In distinguishing the negligence claims from internal church conflicts, the *Van Osdol* court stated in footnote 17:

> "(T)he court...looks to whether the specific danger which ultimately manifested itself could have

> reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs."

Indeed, in *Bear Valley*, there was no inquiry into religious beliefs at either the trial or appellate stages of the action.

Bear Valley contends at page 8 that the State of Colorado is required to restrict its breach of fiduciary duty claim to claims involving financial affairs. Wolfe's petition mirrors that claim at page 27. The essential premise of the argument is that when a clergyman is sued for breach of fiduciary duty other than conduct involving taking money, it is his status as a clergyman which gives rise to the fiduciary duty. This premise was directly addressed in *DeStefano* and in *Moses*. When applying the neutral common law tort of breach of fiduciary duty, the relevant inquiry is "not the profession of the defendants. The relevant facts are that the defendants . . . occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty." *Moses, supra*, footnote 13.[3]

Since neither defendant presented evidence that the conduct at issue was mandated by a religious belief, the argument about the minister's status is irrelevant. In fact, the record actually shows that Homer Wolfe's conduct was contrary to the church's religious beliefs, as discussed in

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[3]The briefs by both Bear Valley and Wolfe allege that the Colorado Supreme Court erred when it decided the *Moses* case. This Court declined to review the decision of the Colorado Supreme Court in that case in 1994 at 114 S.Ct. 2153.

I(B)(i.), *infra*. However, assuming that Bear Valley or Wolfe had shown that a minister's status required him to abuse children, the result here would be the same because the torts at issue are neutral laws of general applicability. The Colorado Supreme Court has recognized that, under appropriate circumstances, a clergyman may, but need not be, in a position of trust, just as, depending upon the circumstances, a wide range of persons may seek positions of trust. *See, Moses, supra*, and *DeStefano, supra*. The "status" involved is not clergy or non-clergy; it is a person in authority who seeks a special trust such that another has the right to rely on the fiduciary.[4]

The torts at issue are neutral laws of general applicability, both on their face and in their application. It is not the status of "minister" that creates the duty, it is the act of a person in a position of superiority offering help to a person who is vulnerable such that the person in the position of superiority assumes a duty to act in good faith. An identical result would have been reached in this case if the Church had been a non-religious employer, such as a day care center or a hospice, whose dangerous employee

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[4]At pages 11 and 12, Bear Valley cites a variety of Colorado cases which hold that, where a professional negligence claim is based on exactly the same evidence as a breach of fiduciary duty claim, the two claims are duplicitous. The same cases are cited by Wolfe at page 28 of his petition. In *Crystal Homes v. Radetsky*, 895 P.2d 1179 (Colo. App. 1995), an attorney's fiduciary obligations were based entirely on his attorney-client relationship; in both *Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993) and *Spoor v. Serota*, 852 P.2d 1292 (Colo. App. 1992), *cert. denied* (1993), the doctor's fiduciary obligations were based entirely on his doctor-patient relationship. Those cases are irrelevant to the issues raised here.

provided damaging care or counseling to a vulnerable person.

None of the claims were predicated on actions motivated by religious belief: The negligence claim was based on prior notice to the Church of the danger Wolfe posed; the breach of fiduciary duty claim was based, not on how Wolfe was treated, but on how the DeBoses were treated by entities that sought and then betrayed their trust; the outrageous conduct claims were based on damaging actions taken with full knowledge of the vulnerability of the DeBoses.[5]

The holding by the Colorado Supreme Court in *Bear Valley* is consistent with every decision of this Court. It presents no unsettled or important questions of federal law. Therefore, the petition of the Bear Valley Church of Christ should be denied.

B. Because neither Bear Valley nor Wolfe presented record evidence concerning how

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[5]Wolfe claims at page 28 that the outrageous conduct tort stems from Wolfe's status as a clergyman. The jury instruction is included in Exhibit Z to Wolfe's petition. In fact, the tort is independent of Wolfe's status as a minister. In counseling both Denise DeBose and her son, Wolfe learned that J.D.B. had been abused before the child began counseling and that the child had emotional problems. As the instruction reads: "The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity." Wolfe's actions based on his knowledge of the frailties of both J.D.B. and Denise DeBose, not based on any ministerial status, formed the foundation of the outrageous conduct liability.

tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the actual impact of tort liability.

The Colorado Supreme Court correctly posed the threshold question for any defense predicated on the free exercise clause: Did Wolfe or Bear Valley assert a religious basis for their tortious conduct? Bear Valley's Pet. App. A, 11a-12a. Based on the trial court record, the court concluded that neither Bear Valley nor Wolfe had ever articulated how specific tortious actions were motivated by a deeply held religious belief. At pages 14 and 15, Bear Valley criticizes the Colorado Supreme Court for failing to apply a compelling state interest test where neither Bear Valley nor Wolfe provided evidence on which to apply the test, as was their burden.

i. Bear Valley presented no evidence that its tortious conduct was religiously motivated.

At page 23, Bear Valley claims, for the first time in this litigation, that "laying on of hands" is a "sacred communication of pastoral counseling." At every level of the litigation in the lower courts, Bear Valley has contended that any touching by Wolfe of counselees was not motivated by nor part of any religious belief held by Bear Valley. Indeed, at trial, Bear Valley claimed that it ordered Wolfe to refrain from "medical counseling" after it learned that Wolfe had been checking the genital development of boys. One elder testified that Bear Valley "absolutely" did not

approve of Wolfe's methods (XII:23) and that Wolfe had not raised a religious belief when the elders told Wolfe to stop touching children. Wolfe simply agreed to stop. XII:31. That elder testified that Wolfe's counseling should not have included "any type of physical activity that would require looking, discussing, anything to do with the young man's personal development . . .". XII:49. Another elder testified that Wolfe's counseling was to have been limited to spiritual counseling and that the allegations of physical contact made against Wolfe were outside of Bear Valley's beliefs. XII:80-82. In contrast to claims made by Bear Valley in the lower courts, Bear Valley's current claim that the "laying on of hands" justified Wolfe's conduct, hints, but never says directly that the "laying on of hands" has a religious motivation and would, in some undefined way, extend to "laying hands" on the genitals of children.

Testimony given in the trial court is not the only arena in which Bear Valley condemned Wolfe's conduct as totally unrelated to any religious belief of Bear Valley. In its Opening Brief to the Colorado Supreme Court, Bear Valley asserted repeatedly that the elders ordered Wolfe to refrain from the clinical counseling because it was inconsistent with its religious beliefs.

Bear Valley presented no evidence that any of the specific tortious actions complained of against Wolfe or Bear Valley were either mandated by or prohibited by their religion. There is no religious mandate about keeping secret sexual abuse by its ministers. There is no mandate or prohibition about deceiving and manipulating vulnerable parishioners. In place of a specific articulation of how the acts complained of were mandated by a religious belief,

there is a presumption that, because Wolfe is a minister and Bear Valley religious organization, all actions are religious.

There is no claim anywhere in the record that a religious belief involving "laying on of hands" mandated Wolfe's conduct. Even Wolfe has never raised such a religious mandate. Because of lack of proof that the tortious actions were motivated by religious belief, the Colorado Supreme Court properly found that Wolfe's and the Church's First Amendment defense was merit less.

Because Bear Valley has not alleged -- let alone proven -- that specific tortious acts were "mandated" by religious faith, it has not properly alleged a defense to tort liability under the First Amendment. Specifically, it has never argued at trial or in any of the briefs that its religious faith requires it to (1) authorize ministers who required children to undress and reveal their genitals to provide counseling to psychologically vulnerable parishioners; or (2) allow such ministers to engage in touching the thighs, backs and genitals of minor parishioners.

The Church has never articulated a religious motivation or substantial burden to exercise of religion that could provide the prerequisite of the compelling state interest analysis it requests.

ii. Wolfe presented no evidence that his tortious conduct was religiously motivated.

Unlike Bear Valley, which defended its actions at trial based on Wolfe's conduct being at odds with its

religious belief, Wolfe himself was silent about motivation for his actions, beyond claiming that his counseling was "biblically based," without ever referencing how partial or total nudity, massage or examination of genitals were mandated by any religious belief.[6] He identifies some conduct that may have been religious. The tortious actions at issue, however, were not. Wolfe claims that everything he does is religious conduct; everything he believes is a religious belief.

Wolfe testified that he learned the techniques of touching, not from any religious dogma or text, but from using massage techniques on his sons to help them communicate. Pet. App. A, 14a. He testified that he learned his theory behind having counselees take off their clothing, not from any religious dogma or text, but from a book, *The Gift of Sex*. IX:75-76.

At Wolfe's Appendices E through N, he attaches every pre-trial motion and argument in which he claimed that the First Amendment prohibited subject matter jurisdiction. Never once did he raise a religious basis for his actions. Prior to trial, Wolfe listed 14 affirmative defenses. None concerned any alleged religious motivation for touching children.

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[6]Any biblical basis for Wolfe's techniques was never shared with the parents of the children he touched. He claims that his non-disclosed, post lawsuit-professed beliefs allowed him to touch children without consent of parents and without any authentic consent from the children because of their age.

Wolfe was told in 1988 by the elders to stop touching the "Dean boy." He stopped and asserted no burden to his beliefs. Nothing in the record suggests that his touching of J.D.B. was more religious than his touching of the "Dean boy." Free exercise defenses to common law liability are necessarily dependent on specific facts developed at trial, and the burden of proving with record evidence that the tortious conduct and religious belief are interdependent is with the entity asserting the defense. *Yoder*. 406 U.S. at 215.

Whether Wolfe's beliefs were religious is a legal question to be determined by the court. *United States v. Seeger*, 380 U.S. 163 (1965). Because there was no evidence that the touching, massage and fondling of J.D.B. by Homer Wolfe was motivated by any deeply held religious belief the trial properly made that determination as a matter of law.

As Wolfe states in his petition, he presented no record evidence to the Colorado Supreme concerning a religious mandate for his conduct. In place of record evidence, Wolfe asked the Colorado Supreme Court to treat as a "given" that his tortious conduct was religiously motivated,[7] which the Colorado Supreme Court refused to do.

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[7]Wolfe raises The Religious Freedom Restoration Act , 42 U.S.C. Sec. 2000bb (1993). As discussed above, Wolfe has raised no religious belief which could form the basis of the compelling state interest test required by RFRA. Accordingly, RFRA is facially inapplicable.

The Colorado Supreme Court properly denied certiorari review on the Establishment Clause of the First Amendment, which denial is criticized generally by Wolfe in his petition. Resolution of this case did not require interpreting and weighing of church doctrine, but rather allowed application of neutral principles of law to determine the liability of the Church. In other words, the Colorado Supreme Court determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but secular conduct.[8]

II. The Expert Witness Testimony did not Address Religious Beliefs.

The testimony concerning Wolfe's use of touching and nudity supported claims by the DeBoses that the techniques employed by Wolfe were harmful and inappropriate in any counseling setting. That testimony had nothing to do with questioning dogma, particularly where Bear Valley agreed that the techniques were outside of the expectations of the elders.

Bear Valley misunderstands the testimony of the four experts that are listed at page 26 . Bear Valley says that the first expert, Marie Fortune, was tendered as an "expert in theology." Bear Valley fails to set out the limitation on that

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[8] The Colorado Supreme Courts' holding is consistent with this Court's jurisprudence in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

expert qualification. Rev. Fortune was qualified "as an expert in theology relative to procedures and practices reasonably necessary in a church setting to prevent foreseeable harm." As the Colorado Supreme Court noted, plaintiff was required under the negligence claim to prove that Bear Valley's supervision of Wolfe caused foreseeable harm. The testimony discussed that foreseeability and had nothing to do with religious beliefs.

The second listed expert, psychiatrist Dr. Morall, gave no opinions on standard of care or on religion. Rather, she testified that it was harmful to remove the shirt of a counselee, remove the pants of a counselee, or rub the thigh of a counselee (VII:75) -- none of which were arguably dictated by any religious belief. Indeed, Bear Valley's own expert, Dr. Frey, testified to the same predictable harm.

The third expert, Randy Sims, the Church of Christ therapist appointed by the elders, testified that the boy had been badly hurt. In addition, after Wolfe had suggested a "biblical basis" for his touching and nudity, without itemizing that basis, Sims rebutted that suggestion, which was consistent with all of the testimony presented by Bear Valley that there was no religious basis within the Church of Christ that justified touching the genitals of children.

The fourth expert, Gary Schoener, did not discuss dogma or philosophy. As Schoener testified, the problem of sexual abuse by clergy in counseling settings is pervasive and non-denominational. VII:57. The expert testimony to which Bear Valley objects provides nothing more than a statement of the position that the elders repeated during

trial. Wolfe had no medical credentials or training which qualified him to touch the genitals of children. Bear Valley reiterated that position at trial, but is critical that witnesses for the Deboses testified to it.

As the Colorado Supreme Court notes at page 21a, the trial court took care to preface the introduction of expert testimony with repeated cautionary instructions limiting the evidentiary use of the testimony. The only questions about general standards of pastoral care posed to any witness, were asked by the defense. VII:150 ll. 23-25; VII:151: ll. 1-12. Likewise, the only questions about religious dogma or philosophy were asked by the defense. VII:162: ll. 10-13. No witness was tendered to render opinions of standard of care. VII:46; VIII;52; XI:11-13.

CONCLUSION

The Colorado Supreme Court's decision correctly applied the legal standards as set forth in decisions by this Court by applying uncontroversial, universally accepted principles of constitutional law. Therefore, this Court should deny the petitions of the Bear Valley Church of Christ and of Homer Wolfe.

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April 21, 1997

FILED
MAY 9 1997
OFFICE OF THE CLERK

No. 96-1637

In The

Supreme Court of the United States

October Term, 1996

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE, JOHN DeBOSE, and
BEAR VALLEY CHURCH OF CHRIST,
a Colorado Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Colorado

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The DeBoses' Brief in Opposition makes two main arguments. Each will be addressed in turn.

1. **Response to DeBoses' Argument I, which argues that "The Colorado Supreme Court followed well-settled decisions of this court in holding that legal restriction of 'secular conduct' not proven to be rooted in religious belief does not burden the free exercise of religion" [title of DeBoses' Argument I.A.], and that the petitioners presented no evidence that their "tortious conduct was religiously motivated" [excerpt from title of DeBoses' Arguments I.B.1. and I.B.ii.].**

The DeBose respondents attempt to characterize these causes of action as "legal restriction of 'secular conduct' ", and argue by analogy to zoning, unemployment, draft-resistance, and similar types of cases, contending that there can be no invocation of Free Exercise protection unless there is evidence that the conduct in question is based on a sincerely held religious belief. The point which has become obscured in the decision of the Colorado Supreme Court in *Bear Valley Church of Christ v. DeBose*, and which the DeBose respondents remain intent on obscuring in their Brief in Opposition, is that the "religiously motivated activity" in which Mr. Wolfe was engaged was **pastoral counseling**. Pastoral counseling is by nature an ecclesiastical function. Mr. Wolfe[1] was a minister of God, and the activity complained of occurred during pastoral counseling sessions. It is the **context** of pastoral counseling which triggers Free Exercise Analysis. In spite of its holding in *this* case, even the Colorado Supreme Court previously declined to recognize a cause of action for "clergy malpractice," in part because such a cause of action "would

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[1] In common parlance, Homer Wolfe would be referred to as Reverend Wolfe, but such titles are not favored in the Church of Christ. Therefore, he is referred to here as "Mr. Wolfe."

derogate the constitutionally protected interest of ministers, priests, and rabbis to conduct bona fide marriage counseling as guaranteed by the Free Exercise Clause of the First Amendment." *Destefano v. Grabrian*, 763 P.2d 275, 289 (Colo.1988) [Quinn, J., concurring]. However, the causes of action for breach of fiduciary duty and outrageous conduct have since been exploited to derogate exactly that "constitutionally protected interest."

It makes no sense to say that pastoral counseling is constitutionally protected in the abstract, but then to declare open season on the *methods* employed by a clergyman providing pastoral counseling. How is the free exercise of religion in pastoral counseling protected, if the state stands ready to impose liability on the clergyman for everything he says or does in counseling, unless he can offer up a specific scriptural or canonical mandate for his action? In fact, the inquisition as to whether a particular pastoral counseling technique is sufficiently "religious" must itself be viewed as an encroachment of government into the exclusive purview of religion.[2]

In the case now before the court, Homer Wolfe has consistently said that, if he had any physical contact with John DeBose, that was massage administered in the course of pastoral counseling, to further the goal of pastoral counseling. Mr. Wolfe expressly stated that his role as a pastoral counselor was to bring individuals closer to God: "That was my

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[2] This is not to say that everything which transpires between a clergyman and a member of the congregation whom he is counseling falls within the Free Exercise Clause. In *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), Father Grabrian acknowledged that his sexual affair with Mrs. Destefano was not in furtherance of pastoral counseling, and thus had no religious motivation. Under those circumstances, no Free Exercise analysis was triggered.

Where a clergyman *does* assert that his actions in the course of pastoral counseling were religiously motivated, there may properly be a factual inquiry as to what his actions were, and factual determination by the jury as to where the assertion of religious motivation is sincere. However, within the framework of pastoral counseling, any assertion of religious motivation should at least trigger Free Exercise analysis.

entire basic goal, to get people back to God, in communication with him, living with him and for him; and all the counseling I did was designed to do that. And, of course, the only ways that God speaks – letting him be responsible, let him keep his promises, learning our – helping other people to learn how to open their hearts." [Vol. 13, 42:21-43:2.] Wolfe testified that he has never tried to provide secular counseling, that his counseling has always been religiously-oriented, and that he has never tried to engage in sexual conduct during pastoral counseling:

> "Q. Referring to the kind of counseling that you have done, Homer, are there different kinds of counseling?
>
> "A. Yes, there are.
>
> "Q. What are there, two basic types?
>
> "A. Two basic types, yes. One is generally speaking, secular counseling and the other is pastoral counseling.
>
> "Q. What is secular?
>
> "A. The word "secular" itself means the absence of God, without God; and so the secular counselor does not call upon God or pinpoint him or consult him at all. In fact, it is sort of like man pulling himself by his own bootstraps, finding the pulpit within himself and the direct contact. Jeremiah said, it is not in the way of man to get in the steps. In other words, we can't find our way in life without God. And in the pastoral counselor, where a pastor brings – the best picture is of a shepherd. It brings to mind the shepherd without whom the sheep – the sheep are helpless. They can't defend themselves. He gets them food or water. They must have someone to direct them. This is the shepherd. It's man not being able to direct his own steps, must have God's and Christ's help in finding his way out of his hurting way of life into a acceptable, happy way of life. So pastoral counseling depends upon Christ, not upon the counselor, and God.

"Q. Have you ever done any secular counseling?

"A. No, sir.

"Q. All of your counseling has been pastoral?

"A. Yes, very definitely.

"Q. Is that sometimes referred to as – also as biblical counseling?

"A. Yes, sir, it is.

"Q. And Christian counseling?

"A. Yes, sir, they're the same.

"Q. Over the years when you have been called on to counsel people in pastoral counseling, have you explained each time to the counselee what can be done by them – or them in order to obtain help?

"A. Yes, sir. I've always made it a point to point out basically the facts of pastoral counseling, telling them that actually I have no power to change your lives. I do not have the wisdom or the understanding of the Lord to change your lives, that – but that I could be a facilitator in order to help them get communication with God and find –

. . . .

"Q. (By Mr. Johnson) As I understand your last answer, then, you have always explained to any counselee that he must receive help from God, if at all, but that you will do your best to help?

"A. As your only source.

"Q. If a person came to you for counseling and said he was not willing to seek help from God, would you have offered counseling to him?

"A. No. I'd suggest that he seek – he or she seek secular counseling.

"Q. In all of your counseling activity, Homer, over the – by the way, about how many years were you a minister in the Church of Christ before you retired?

"A. Approximately 40.

"Q. And in all of those 40 years, were you called on with varying degrees of frequency to counsel with people when they came to you?

"A. Yes, sir. That is just normal expectancy of one in the ministry.

"Q. In all of your counseling in that 40-year period, did you ever have any sexual attraction to anyone that was in counseling with you?

"A. Absolutely not.

"Q. Did you ever have any sexual motives in anything you have ever done in counseling with anyone?

"A. No, sir.

"Q. Were you ever, whether in or out of counseling, ever sexually attracted to any man or boy?

"A. Not at all.

"Q. In all of your counseling, have you ever done anything that – other than what you considered to be in the best interests of the counselee?

"A. I've always been highly concerned about the welfare of my counselees. I have cared for them. I have been concerned about them and their needs and any activities."

[Vol. 13, 11:8-13:3, 13:25-15:10.]

It is obviously true that not all the problems Mr. Wolfe confronted involved scriptural interpretation, but pastoral counseling extends beyond that which is directly targeted at meeting spiritual needs. Again, in *Destefano v. Grabrian*, even the Colorado Supreme Court recognized this:

"[C]ounseling by members of the clergy is frequently directed to matters that are essentially secular in nature. 'Family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious aspects of a spiritual counselor's activities.' Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*,

> 19 Rutgers L.J. 419, 437 (1988). But see Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal.W.L.Rev. 507, 516 (1983) (pastoral counseling is a religious, not secular, activity in which '[i]t is impossible to separate the 'cure of the minds' from the 'cure of the souls'); Comment, *Clergy Malpractice; Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137, 139 (1986) ('While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective.')."

Id. at 285, fn. 10.

The DeBoses have disputed whether Wolfe's conduct during pastoral counseling sessions was religiously motivated, and counsel for this petitioner acknowledges that there was a jury question, although *not* as to the correctness of Mr. Wolfe's professed methods, but as to the *sincerity* of his contention as to his motivation. The jury needed to be instructed that, if it believed Mr. Wolfe, he was protected by the Free Exercise Clause.[3]

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[3] Even if there were no Free Exercise Clause issue presented, there would clearly be an Establishment Clause issue. Whether or not the conduct is religiously motivated, the imposition of this type of civil liability amounts to government regulation of the overall activity of pastoral counseling, in contravention of the Establishment Clause. *Barquin v. Roman Catholic Diocese*, 839 F.Supp. 275 (D.Vt. 1993). See, also, *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993). The Colorado Supreme Court denied certiorari on the Establishment Clause issue, and thus left standing its earlier holding in *Moses v. Diocese*, which the Court of Appeals treated as controlling. 890 P.2d at 221. The DeBoses have made no response to the Establishment Clause argument.

2. Response to the Deboses' Argument that the testimony of the plaintiffs' experts "did not address religious beliefs" [Deboses' Argument II].

This part of the DeBoses' brief is apparently intended to support either a contention that these causes of action do not infringe on the free exercise of religion, because they supposedly do not require that a standard of care be set for pastoral counseling, or to support a contention that these causes of action do not involve any "establishment" of religion, because they supposedly do not require that a standard of care be set for pastoral counseling. If it were true that no expert testimony was received as to what conduct is acceptable in pastoral counseling, these causes of action would be no less disturbing, for the reasons set forth in Wolfe's Petition. However, the fact is that the jury heard reams of expert testimony intended to set boundaries for permissible pastoral counseling.

The plaintiff brought four experts to testify: Marie Fortune, who is a clergyperson, as an expert in Theology; Dr. Kathy Morall, as an expert in psychiatry; Mr. Randy Sims, as an expert in psychotherapy; and Mr. Gary Schoener, as an expert in psychology. Each of these witnesses was asked to provide expert opinions as to the standard of care ostensibly governing pastoral counselors, and as to Homer Wolfe's breach of that standard.

Marie Fortune is a clergyperson with the United Church of Christ (a denomination unrelated to the Church of Christ, in spite of the similarity of the names), and executive director of the Center for the Prevention of Sexual and Domestic Violence in Seattle, Washington. [Vol. 11, 8:1-8.] She was offered "as an expert in *theology* to testify to procedures and practices in a church setting necessary to prevent reasonable foreseeable harm" [Vol. 11, 11:1-3 (emphasis added)], and she was accepted by the court as such.[4]

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[4] Because of the implications of offering an "expert" in "theology," Ms. Seelen immediately added the disclaimer "I am not asking Reverend

Reverend Fortune testified to a "line" or "boundary" which may not be crossed in pastoral counseling, "an appropriate framework in which one functions pastorally and beyond which it becomes inappropriate. . . . " [Vol. 11, 17:9-15.] She was also allowed to give the jury her opinion that a "pastoral relationship" should be judged by the same standards as "in a therapeutic relationship, in the doctor/patient relationship, in the teacher/student relationship. . . . " [Vol. 11, 21:7-10.]

Reverend Fortune also stated expert opinions judging Mr. Wolfe's "qualifications for the job that he was asked to do." [Vol. 11, 29:13-14.] She said that, as she recalled, his only "qualifications had to do with the fact that he had been a preacher for a number of years and that he was a former director of education at the churches he served previously" and that, in her opinion, "neither of these things qualified him for the position that he was being asked to serve in." [Vol. 11, 29:14-20.]

Reverend Fortune gave standard of care opinions as to what is "inappropriate in the pastoral relationship." [Vol. 11, 33:22-23, 44:6-14.]

Similarly, Dr. Kathy Morall, who was offered and admitted to testify as an expert "in psychiatry qualified to give opinions on diagnosis, treatment, and prognosis," [Vol. 8,

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Fortune to testify to religious beliefs or doctrine." [Vol. 11, 11:3-5.] On voir dire, Reverend Fortune acknowledged that her testimony would be based on her "own studies and records as far as what you devise for the procedures you believe should be followed," and that there are no standards she had discovered "within church bodies." [Vol. 11, 11:23-12:5.] Counsel for defendant Wolfe objected to her testimony "as an expert on what sounds as if it is to be directed toward a standard of care for a pastoral counselor, and we continue our objection on grounds that a civil court does not have jurisdiction to determine standards of care for church activities, and we think that this testimony would necessarily involve that subject. [Vol. 11, 12:19-13:1.] The court allowed her to testify as an expert on the basis that "she's got a level of education, training, and experience which would be of benefit to the jury in evaluating and determining the issues presented by this case." [Vol. 11, 13:2-7.]

52:1-4, 19-23], was allowed to testify, over objection, as to the "inappropriateness" of various pastoral counseling techniques Homer Wolfe "has on occasion used," based on her "professional experience." [Vol. 8, 74:24-75:25.]

Randy Sims was offered and accepted "as an expert in psychotherapy, qualified by reason of his education and expertise to render opinions on diagnosis, prognosis, and treatment." [Vol. 11, 67:2-5, 68:3-6.] He also was allowed to testify that Homer Wolfe violated the standard of care of "current law with psychological ethics, going back to the early '80's. . . . ." [Vol. 11, 72:3-4.]

Gary Schoener was offered "as an expert in psychology qualified to render opinions in psychology as well as responsibility of supervision in church setting and avoiding reasonable foreseeable injury." [Vol. 7, 46:11-14.] On voir dire, he stated that he "expect[ed] to give an opinion about how . . . Homer Wolfe should have conducted his pastoral counseling." [Vol. 7, 50:2-12.] He was accepted as an expert and allowed to give expert testimony in this area over objection. [Vol. 7, 50:14-21.] He went on to state an opinion (over objection) that Mr. Wolfe did not have the necessary qualifications to be administering the pastoral counseling he was providing, and that the Bear Valley Church of Christ should have been supervising him. [Vol. 7, 60:19-61:21.] He was asked to state an opinion "within a reasonable degree of psychological certainty, as to whether or not there was a breach of duty to the people he was counseling" and although he stated that he had "difficulty opining on that," he went on to voice an opinion that, under certain assumptions, "then it was a breach of duty, you know. . . . " [Vol. 15, 62:13-23.]

The Colorado Court of Appeals recognized the problem with this expert testimony in the *Bear Valley* case, and ruled that some of this expert testimony was improperly received. 890 P.2d at 224-228 (Appendix C, pp. 57-67). In reversing the Court of Appeals, the Colorado Supreme Court made a blanket statement that none of this testimony was improper (Appendix A, pp. 26-31), and similar testimony must be expected in other cases if these causes of action stand.

CONCLUSION

This case does warrant the attention of the Supreme Court of the United States. Battle lines have been sufficiently drawn between courts which give at least some meaning to the Religion Clauses in this context, and courts which have so eviscerated the religion clauses as to give them no meaning. In the first class are cases such as *Schmidt v. Bishop,* 779 F.Supp. 321 (S.D.N.Y. 1991); *Dausch v. Rykse,* 52 F.3d 1425 (7th Cir. 1994); *Barquin v. Roman Catholic Diocese, supra; Schieffer v. Catholic Archdiocese of Omaha, supra; Nally v. Grace Community Church of the Valley,* 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988); *H.R.B. v. J.L.G.,* 913 S.W.2d 92 (Mo.App. 1995); and *Amato v. Greenquist,* ___ N.E.2d ___ (Ill.App. 1997), 1997 WL 182763 (decided 4/16/97). (Even some of these cases allow "outrageous conduct" claims, but they have at least held the line on "breach of fiduciary duty.") The second class of cases is exemplified by the Colorado Supreme Court's decisions, although there are a growing number of other courts which are following Colorado's lead, such as *Erickson v. Christenson,* 99 Or.App. 104, 781 P.2d 383 (1989); *Jones v. Trane,* 153 Misc.2d 822, 591 N.Y.2d 927 (1992); *Sanders v. Baucum,* 929 F.Supp. 1028 (N.D.Tex. 1996); and *F.G. v. MacDonnell,* 291 N.J.Super. 262, 677 A.2d 258 (App.Div. 1996). The petitioner respectfully submits that the time has come for this court to take up this issue, to provide guidance not only to Colorado, but other jurisdictions around the country. This phenomenon will not go away, and there will be no better time to deal with it.

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